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No. -

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1988

SUKETU H. NANAVATI, M.D.,

Petitioner,

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL and EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE BURDETTE TOMLIN MEMORIAL HOSPITAL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Does the decision below, affirming judgment notwithstanding the verdict on Petitioner's antitrust claim against Respondent Hospital under Sherman Act Section 1, 15 U.S.C. § 1, conflict directly with *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), where the jury found that the Respondent Hospital participated in a contract, combination, or conspiracy in violation of Section 1 and where there was abundant evidence that the Hospital, through its employee nurses and through physicians operating its emergency room under contract with and for the Hospital, had joined with other physicians in the community in agreeing not to refer patients to Petitioner?

2. Does the decision below upholding judgment n.o.v. conflict with *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962), where the jury found that the Hospital had entered into a contract, combination, or conspiracy in violation of Sherman Act Section 1 and where the Hospital had entered into an exclusive contract with a non-cardiologist for the professional interpretation of highly specialized cardiological tests when Petitioner was known to be the only board certified cardiologist on the Hospital's medical staff who was fully qualified by training and experience to interpret such tests?

3. Is Petitioner, an antitrust plaintiff, who successfully proved both the existence of a Sherman Act Section 1 combination and injury to his business or property caused in fact by the actions of the combination, entitled as a matter of law under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), to an award of at least nominal damages and, therefore, a reasonable attorney's fee and expenses incurred in vindicating the antitrust laws?

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1. The parties below were Petitioner Suketu H. Nanavati, M.D. ("Nanavati") and Respondents Burdette Tomlin Memorial Hospital ("Burdette Tomlin," "BTMH," or "the Hospital"), the Executive Committee of the Medical Staff of Burdette Tomlin Memorial Hospital ("the Committee"), and Robert J. Sorensen, M.D. ("Sorensen"). Together with this Petition, Nanavati is filing with the Clerk a notice pursuant to Rule 19.6 of the Court, of his belief that Sorensen has no interest in the outcome of the Petition.

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OPINIONS BELOW

The opinion below of the United States Court of Appeals for the Third Circuit is reported as *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96 (3d Cir. 1988). The opinion of the trial court granting the defendants' motion for judgment notwithstanding the verdict as to the antitrust claims and denying Petitioner Nanavati's motion for judgment notwithstanding the verdict on state law defamation claims against him is reported as *Nanavati v. Burdette Tomlin Memorial Hospital*, 645 F. Supp. 1217 (D. N.J. 1986). These opinions, which are reproduced in the Appendix hereto, are cited in this Petition as "857 F.2d at ____" or "645 F. Supp. at ____," as the case may be. (Citation to the Appendix is in the form "A-____," while citation to the Joint Appendix in the United States Court of Appeals for the Third Circuit is in the form "____a.")

JURISDICTION OF THE COURT

The judgment of the United States Court of Appeals for the Third Circuit was entered on October 4, 1988. Petitions for rehearing were denied by that court on September 26, 1988. Jurisdiction of the Court to review said judgment by writ of certiorari is invoked under and conferred by 28 U.S.C. § 1254(1).

No.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves Petitioner Nanavati's antitrust claims under Section 4(a) of the Clayton Act, 15 U.S.C.

§ 15(a), arising from violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Sherman Act Section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act Section 4(a) states:

> (a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—
>
> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that

such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings, and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

In addition, because the decision below affirmed the grant of judgment notwithstanding the verdict after the jury found an antitrust violation and awarded Petitioner $350,000 in single antitrust damages, the Seventh Amendment to the United States Constitution is implicated. It provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This Petition follows a jury verdict in favor of Petitioner Nanavati on his antitrust claims against Burdette Tomlin and the Executive Committee of its Medical Staff. In answer to special verdict questions, the jury found that the Hospital and Committee participated in a contract, combination, or conspiracy which was an unreasonable restraint of trade. 645 F. Supp. at 1237-39. The jury awarded Nanavati single damages in the amount of $350,000. *Id.*, at 1239. Judgment in the trebled amount of $1,050,000 was entered on July 23, 1986.

On October 2, 1986, the trial court, the United States District Court for the District of New Jersey, granted the motion of the Hospital and Committee for judgment notwithstanding the verdict. 645 F. Supp. 1217ff. The United States

Court of Appeals for the Third Circuit affirmed. 857 F.2d 96ff.[2] The facts out of which this litigation arose are briefly as follows.

Dr. Nanavati is a physician who is board-certified as an internist and as a cardiologist. In order to be eligible for board certification in the subspecialty of cardiology, a physician must first be board certified in the specialty of internal medicine. 4082a. The physician must also be trained in a post-residency fellowship specifically in cardiology for a period of two years.

Since 1979, Nanavati has engaged in the private practice of medicine in Cape May County, New Jersey (the "County") and receives compensation on a fee-for-service basis. Burdette Tomlin is the only hospital in the County.[3] Nanavati was admitted to the Staff of BTMH in the spring of 1979. He was the first board-certified cardiologist on the Staff.

Sorensen has been, at all relevant times, a physician on the BTMH Staff, Chief of Cardiology, a member of the BTMH Board of Governors, and a Vice President of BTMH. 4055a. During the period in issue, he became Chief of Medicine as well. Sorensen has also been, at all relevant times, a physician in private practice in the County who provides medical care to patients on a fee-for-service basis. He has held himself out to the medical profession and public in the County as a cardiologist, although he has not been certified as such by the appropriate medical subspecialty board and is not even eligible by training to become board certified. 5104a.

The Staff of BTMH is composed of all physicians who are entitled to practice medicine at BTMH. The Staff is governed by a set of Bylaws which determines the Staff's structure and certain relationships between the Staff and its members and

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2. The Third Circuit also reversed a judgment against Petitioner Nanavati and in favor of Sorensen and the Hospital on their claims for slander and tortious interference with business relations under New Jersey law. None of those claims is presented here.

3. Cape May County is geographically isolated. It is bounded by water on three sides: by the Atlantic Ocean to the east and south and by Delaware Bay to the west.

among those members. 3005a. The Staff's Executive Committee is the governing body of the Staff, and the members of the Committee are elected by the Staff membership. 3050a-3052a.

The Board of Governors is the governing body of BTMH. It approves the Staff Bylaws. 3067a.

Over his first few years at Burdette Tomlin, Nanavati developed a growing cardiology practice. But he also became aware of instances of improper professional readings and interpretations by Sorensen of electrocardiograms ("EKG's") on his, Nanavati's patients.[4] In these instances, Nanavati would bring the matter to the Committee's attention. Nanavati's letter dated January 22, 1981, is an example of an attempt to bring to the Hospital's attention Nanavati's concerns about Sorensen's failures on occasions to read EKG's correctly. 2297-1a. The letter, expressing concern for the possibility of needless loss of life, was sent only to those with a need to know and an ability to take corrective action. These included certain Staff officers, the Hospital's top administrator, and the chairman of its board of governors, as well as Sorensen. *Id.*

The Staff rejected Nanavati's charges allegedly in reliance upon the opinion of an outside expert. Instead, the Chairman of the Committee, Dr. Alameno, testified that at a gathering at his home on August 2, 1982, the Committee decided—without any charges having been brought against Nanavati—that he would be removed from the Staff. 5128a. Alameno also admitted that, even before this meeting, the decision to oust Nanavati had been approved separately by the Staff's attorney and by the Hospital's attorney, Mr. Valore. 5125a.

When charges were ultimately lodged against Nanavati for the purpose of ousting him, he was repeatedly denied

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4. The Hospital reader provides the official professional interpretation of the EKG's done in BTMH. The patient pays for this "service" in addition to what the actually attending physician charges for his or her own reading of the same EKG.

important rights under the Staff's Bylaws. As a result, Nanavati was summarily expelled from the Staff in November, 1982. He turned to the New Jersey courts and obtained injunctive relief reinstating him. After numerous orders and purported Hospital "hearings," the New Jersey Superior Court, Chancery Division made its injunction permanent.

The state court ruled that Nanavati's various "hearings" at BTMH were a nullity because his case was pre-determined and the proceedings were tainted with that prejudgment. This ruling was upheld by the Appellate Division of the Superior Court of New Jersey, 2481a, and then by the Supreme Court of New Jersey.[5] *Nanavati v. Burdette Tomlin Memorial Hospital*, 107 N.J. 240, 526 A.2d 697 (1987). The trial court below accorded that decision collateral estoppel effect, and so informed the jury. 215a; 5000a.

After the attempt summarily to oust Nanavati from the Staff, Nanavati began to suffer the effects of a boycott. Referrals of patients from the Emergency Room ("ER") dried up, and other physicians for the most part stopped sending him patients for either consultations or referrals.[6] 6007a; 6008a. Even shortly before trial, ER personnel were not notifying Nanavati when his own patients would come in and ask for him. 5097a-5103a.

When state court intervention derailed the attempts to remove Nanavati, the Hospital in early 1983 sought out Dr. Henry Komansky, a pulmonologist, for the purpose of having

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5. While the Appellate Division and the Supreme Court affirmed the Chancery Division's findings, they vacated the portion of the injunction which precluded a new, untainted set of hearings at the Hospital. Finally, however, the Hospital abandoned all charges. A consensual permanent injunction was entered on November 15, 1988. See Appendix at A-107.

6. A consultation occurs when an attending physician seeks and obtains for his or her patient the specialty advice or care of another physician, while the physician seeking the consultation continues as the principal doctor for the patient's care. A referral occurs when a doctor sends her or his patient to another specialist for complete care and treatment of a specific condition within the specialist's field of expertise. After the referral, the patient may or may not return to the original physician for care in other matters.

his group provide exclusively certain cardiological specialty services. 4264a. These included particularly the interpretation of echocardiogram tests, highly sophisticated ultra-sound techniques for watching the inside of the patient's heart while it beats. At that time, although Nanavati was qualified to provide such specialized interpretive services, Komansky was not, and Sorensen did not. 4058a; 6002a; 6009a.

The effect of this contract was that, when Nanavati wanted echocardiograms performed on his hospitalized patients, they were charged for an official Hospital interpretation which their chosen doctor was not allowed to perform.

Also, in 1983, as part of its repeatedly unlawful proceedings in trying to exclude Nanavati from the Staff and otherwise to discredit him in the eyes of fellow physicians and the public, the Hospital's Board of Governors Hearing Committee formulated a lengthy report. Whereas Nanavati's criticisms of Sorensen had been lodged internally, BTMH published this report. It was furnished to the members of the press for inspection at the Hospital (4295a), and a copy of it was made available in the local public library (5095a). To assure even broader dissemination of the hearing committee's report and recommendation that Nanavati be removed from the Staff, and in furtherance of its plan to discredit Nanavati publicly, Burdette Tomlin actually held a press conference on the subject. 4295a.

REASONS FOR GRANTING THE WRIT

1. The Ruling below Conflicts with the Court's Decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*, Because the Unlawful Actions of the Hospital's Agents are to be Imputed to their Principal.

The jury in this case found unequivocally that the Hospital and Committee were parties to a contract, combination, or conspiracy in violation of Section One of the Sherman Act. The jury found that there was a group boycott and awarded Petitioner Nanavati $350,000 in single damages as a result.

Nevertheless and despite the deference the Seventh Amendment commands should be accorded a jury's verdict, the district court granted judgment n.o.v. in favor of the Hospital and Committee. The Third Circuit affirmed.

In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court held that a nonprofit organization could be held "civil[ly] liab[le]" under the antitrust laws for acts of its agents performed with apparent authority. *Id.* at 559. This imputed liability is appropriate, the Court explained, because the corporation's agents "are able to affect the lives of large numbers of people" as well as "the competitive fortunes of businesses" in the area. *Id.* at 577. They achieve this ability in no small part because, as in this case, the corporation "cloaks its [agents] with the authority of its reputation." *Id.*, at 571. Thus, "when the great influence of [the corporation]'s reputation is placed at their disposal, the less altruistic of [the corporation]'s agents have an opportunity to harm" individual competitors. *Id.*

The Third Circuit, in discussing Nanavati's group boycott claim, never analyzed the relevant evidence under the *Mechanical Engineers* standard, which is sufficient to uphold the Hospital's liability. For example, the evidence showed that Hospital nurses in the Emergency Room failed to notify Nanavati even when his own patients arrived there and requested his services. 5098a-5103a. The evidence showed that, on at least one such occasion, Nanavati was actually physically in the Hospital at that time. *Id.* On another occasion, one of Nanavati's patients was told by emergency room nurses employed by the Hospital that Nanavati could not admit the patient because Nanavati was behind in his paperwork,[7] yet the president of the Hospital was later forced to admit, after checking the Hospital records, that no such "records" suspension had been imposed on Nanavati at that time. A-109.

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7. When a physician is behind in his or her obligation to complete the charts of patients who have been in the hospital, the physician's privilege to admit additional patients may be suspended until the backlog is cleared. This temporary measure is frequently referred to as a "records suspension."

Other evidence, which the court of appeals failed to view in the light most favorable to Nanavati, showed widespread agreement among other doctors practicing at the Hospital (who were *not* Hospital agents) that "the Indian doctors are overrunning us and we have to stop it" (4071a) and that "we have to fight" foreign doctors coming into the area by "bring[ing] in an American cardiologist" after getting rid of Nanavati.[8] 4335a-36a. Moreover, certain staff physicians agreed to limit referrals by Indian doctors of patients from the Hospital's emergency room to the intensive care unit. 4073a. And one ER physician, who was a member of the medical staff under a contract to operate the ER for the Hospital, testified that he was told by another doctor, after referring a patient to Nanavati, that he should keep these referrals "in the family." He understood this meant not to refer patients to Nanavati. A-110. Another ER physician testified that, as a result of instructions from the director of the ER, he decreased the number of patients he referred to Nanavati. A-112. Moreover, he testified that

> there were nurses that felt the same way I did, that the care by Dr. Nanavati was such that should be given to the patients; and if the nurses were caught suggesting that he was a better doctor, just as I was, that they were in jeopardy of losing their job.

A-115. As a result of these conditions, this ER physician ultimately decided to leave Burdette Tomlin. As he put it, "When I had to stop suggesting who I felt was the best cardiologist, then I felt ... that the quality was down, was poor." A-114.

Clearly, taken as a whole, this is sufficient evidence to impute to the Hospital the conduct of its agents. The jury was entitled to conclude that the drop in referrals to Nanavati was the result of concerted conduct by physicians in the community, and nurses and doctors in the Hospital's emergency

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8. In fact, Nanavati was a naturalized United States citizen born in India.

room. Particularly is this so in light of the efforts by Burdette Tomlin to discredit Nanavati in the eyes of the County's medical community and the public generally.

The Third Circuit failed to apply the agency doctrine of *Mechanical Engineers* to the conduct of the emergency room personnel. The court acknowledged that individual staff doctors (who were not agents of the Hospital) interacted in the ER. 857 F.2d 118. But the court failed to recognize that, because other physicians and nurses employed by the Hospital were part of the conspiracy with those independent physicians, the conspiratorial conduct of the Hospital's agents is imputed to the Hospital.

Where the decision of a court of appeals fails to apply, misconstrues, or misconceives the law announced by this Court in its opinions, the Court will grant the writ of certiorari in order to review the court of appeals decision. See, *e.g.*, *United States v. Doe*, 465 U.S. 605, 610 (1984); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982); *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982); *Henderson v. Kibbe*, 431 U.S. 145, 152 (1977).

This case also presents an issue of national importance in the increasingly competitive health care environment. Will the Court reinstate a jury's verdict for an individual physician harmed by a boycott in which the only hospital in the county actively participated? As the Court has explained in *Mechanical Engineers*, "if . . . [the Hospital] is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future." 456 U.S. at 572. On the other hand, if the writ is not granted in this case, an appellate decision in conflict with *Mechanical Engineers* will encourage conduct which is not only anticompetitive but also contrary to the best interests of patients throughout the country. Left standing, the decision below will encourage hospitals to permit their employees and agents to threaten and coerce physicians, nurses, and patients into not recommending or obtaining the

best treatment available.[9] It will also discourage health care professionals from reporting substandard—and, perhaps, life threatening—medical practices. Particularly in health care, then, our national commitment to competition unfettered by unreasonable restraints has particular importance, because it can assure the availability to the public of the highest level of patient care.

2. The Judgment N.O.V. Upheld below Conflicts with *Continental Ore Co. v. Union Carbide Corp.* and Presents an Issue of Extreme National Importance, Since the Jury Found a Sherman Act Section One Violation, and there was a Patently Unreasonable Exclusive Contract with Potential Adverse Effects on Health Care Quality.

In *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699 (1962), the Court expressly held that antitrust plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." Justice White wrote for the Court, *id.*, quoting *American Tobacco Co. v. United States*, 147 F.2d 93, 106 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946):

> . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.

There, the Court reversed the judgment of the court of appeals which had affirmed a jury verdict against the antitrust plaintiff.

In evaluating the record in this case, the Third Circuit

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9. *Cf.*, *Patrick v. Burget*, 800 F.2d 1498, 1509 (9th Cir. 1986), *rev'd*, 486 U.S. —, 100 L.Ed. 2d 83, 108 S.Ct. 1658 (1988) (The conduct of the physician competitors was "shabby, unprincipled and unprofessional.").

failed to apply the approach clearly enunciated in *Continental Ore* and violated the principle of taking the evidence as a whole—and in the light most favorable to the antitrust plaintiff who prevailed at trial.[10] Worse yet, the court mischaracterized the claims in the record. By holding that there was no evidence[11] from which the jury could have inferred that the Hospital was part of a contract, combination, or conspiracy, the court of appeals failed to consider the evidence of: (1) a group boycott by physicians at the Hospital, (2) the Hospital's participation in this boycott by, *inter alia*, entering into a patently unreasonable exclusive contract, and (3) the exclusive contract as an unreasonable contract itself.

The evidence of Hospital involvement in a contract, combination, or conspiracy is manifest in the record. First of all, the evidence showed that the Hospital sought out Komansky, a pulmonary physician, with whom it contracted for the exclusive provision of in-hospital stress tests and echocardiograms. Yet Komansky was not qualified to provide professional interpretation of the echocardiograms, which are highly sophisticated cardiological tests that Nanavati was the only physician at the Hospital qualified and willing to interpret. Moreover, Komansky charged $200 for interpretation of echocardiograms, although Nanavati had offered to perform his more qualified service for $100. 4266a; 3132a. Thus, the jury knew that the Hospital was providing inferior service at an inflated monopoly price. Therefore, when the jury found there was a contract, combination, or conspiracy in restraint of trade, the jury could have concluded in this record that the Hospital-Komansky exclusive contract was just such a contract.

Further, as a matter of collateral estoppel arising from the

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10. *Patrick v. Burget*, 486 U.S. —, —n. 3, 100 L.Ed.2d 83, 90 n. 3, 108 S.Ct. 1658, 1661 n. 3 (1988).

11. Without explanation, 857 F.2d at 110 n. 14, the court below affirmed the exclusion of proffered evidence that an emergency room physician was told by the director of the Hospital's ER that the doctor was referring too many patients to Nanavati and that the ER director had discussed this with Sorensen.

prior state court litigation,[12] it was *stipulated by the parties* (and the jury was so instructed) that the decision of the Hospital's Board of Governors

> to terminate Dr. Nanavati's staff privileges was not the result of a deliberative process. There never was an attempt to reach an intelligent and reasonable judgment in good faith upon all the facts presented. Instead, the action of the Board in revoking Dr. Nanavati's privileges was a nullity from the beginning to the end. It was based on a prior disposition or a pre-judgment to remove Dr. Nanavati from the Medical Staff. His termination was a foregone conclusion once the charges were brought against him. As such, the Board of Governors abandoned its responsibility as a fiduciary.

5000a-01a. From this stipulation alone, the jury could have inferred that the Hospital had, in entering into the exclusive Komansky contract, acted intentionally to foreclose Nanavati from the opportunity to provide highly skilled medical interpretations of the echocardiogram tests performed at the Hospital. Thus, in its quest to injure Nanavati, the Hospital was willing to abandon its fiduciary duty to its patients to secure the best possible medical care for them.[13]

In addition, the jury could have determined from the conclusively found bad faith of the Hospital that it acted in furtherance of unlawful conduct of others. After all, conspiratorial conduct is rarely proved by direct evidence. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223-28 (1939). Since there was no legitimate explanation for the Hospital's conduct, the jury obviously could conclude—particularly in light of the admonition in *Continental Ore* that an

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12. The state court findings in this regard were upheld by the Supreme Court of New Jersey. *Nanavati v. Burdette Tomlin Memorial Hospital*, 107 N.J. 240, 526 A.2d 697 (1987).

13. While Nanavati was clearly an injured target of the Hospital's exclusive contract, the provision of quality health care to the consuming public—the Hospital's patients—was also sacrificed by the Hospital through the unreasonable contract.

antitrust plaintiff's evidence not be compartmentalized—that the Hospital was attempting to join in and enhance the effects of the physicians' boycott by a total exclusion of Nanavati from the only hospital facilities in the isolated County. The Court has recent experience with such attempts by hospitals and physicians. *See Patrick v. Burget*, 486 U.S. —, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988).

The Third Circuit nevertheless reached the opposite conclusion by misstating that "Nanavati does not maintain that the Hospital took official action in furtherance of the boycott." 857 F.2d at 119-120. Moreover, the court stated, *id.*, at 120 n. 23:

> Nanavati also maintains that an exclusive contract with Dr. Henry Komansky for the provision of stress and echocardiogram tests is sufficient to implicate the Hospital in a conspiracy to exclude him, but Nanavati does not indicate how the Komansky contract would demonstrate the Hospital's involvement in either of the two anticompetitive acts sought to be proved at trial—the staff privileges revocation or the boycott of referrals.

These statements are contradicted by the record, as the preceding discussion establishes. Further, Nanavati *did* argue that the exclusive Komansky contract initiated by the Hospital could be viewed by the jury, not only as evidence of the Hospital's involvement in the boycott of Nanavati but also as a separate contract in restraint of trade. Contrary to the appellate decision below, the district court itself understood Nanavati to be asserting that the Komansky contract was a contract in unreasonable restraint of trade and addressed it as such. 645 F. Supp. at 1233. Indeed, the district court acknowledged (*id.*, italics supplied) that

> Nanavati *relies heavily*, in support of his argument that liability under the antitrust laws can properly be imposed against the Hospital in this case, on the fact that the Hospital contracted with a pulmonary specialist, Dr.

> Henry J. Komansky, for the exclusive official reading and interpretation of stress tests and echocardiograms.

The Court has frequently recognized that "a principal purpose of the antitrust private cause of action ... is, of course, to deter anticompetitive practices." *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982). *See also Pfizer, Inc. v. Government of India*, 434 U.S. 308, 314 (1978); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342-344 (1979). In light of that central purpose, it is important for the Court to grant this Petition in order to uphold a jury verdict of antitrust violation arising out of an exclusive services contract in the circumstances here.

Particularly is this so in light of the holding in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). There the Court rejected a claim that an exclusive anesthesiology contract constituted an unlawful tying of that service to the service for surgery at the hospital. The Court was careful to note, however, that the contract could have been unlawful in other circumstances. In footnote 51 to its opinion, the Court observed (*id.* at 30; italics supplied):

> Like any exclusive-requirements contract, this contract *could be unlawful* if it foreclosed so much of the market from penetration by Roux's competitors as to unreasonably restrain competition in the affected market, the market for anesthesiological services.

This Petition presents, therefore, not only a failure by the court below to adhere to the dictates of *Continental Ore*, but as well the important question of federal law whether, in the facts of this case, the exclusive contract and other conduct of the Hospital were, as the jury determined, a violation of Sherman Act Section 1. The legality of the exclusive contract here is an important public matter of national significance, which goes well beyond the interests of the parties in this case. As explained, the Hospital sacrificed quality health care

to isolate a qualified physician from patients. Health care services throughout the nation are threatened if that kind of conduct is not reviewed and held unlawful.

3. Entitlement, as a Matter of Law, to an Award of at Least Nominal Damages and Attorney's Fees and Costs is an Important Issue of National Antitrust Policy where the Plaintiff has Proved a Violation of the Sherman Act and Causation of Injury.

As previously noted, the record in this matter is replete with evidence that numerous entities (including the Hospital and individual physicians) acted with the Executive Committee to harm Nanavati in violation of Section 1. The jury, upon consideration of this evidence found, *inter alia*, that the Executive Committee was a combination in unreasonable restraint on interstate commerce, thereby injuring Nanavati in his business or property. 857 F.2d at 115-16. Based upon these findings the jury awarded Nanavati single damages of $350,000.

In affirming the district court's entry of judgment n.o.v. on petitioner's antitrust claims, the court of appeals concluded that there was an unlawful combination, but Nanavati had failed to prove any damages flowing from the five day revocation of his staff privileges by the Executive Committee. *Id.*, at 121-22. The court based this conclusion upon its findings of no "quantified" evidence of economic loss suffered by Nanavati during this period and no evidence of long term damages resulting from the revocation. *Id.*, at 122. In so ruling, the court either ignored or misapprehended the factual record which established that Nanavati sustained significant damages, including lost revenue and the expenditure of legal fees, as a result of the improper revocation. See A-111, A-116, A-117. The jury's findings on this issue were clear and unambiguous and, consistent with Nanavati's rights under the Seventh Amendment, entitled to proper deference. *See Aurwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 890-91 (2nd Cir. 1988).

By failing to give due consideration to the evidence of damages sustained by petitioner and proper deference to the jury's findings based upon this evidence, the court below erred in its determination to affirm the district court's entry of judgment n.o.v. on Nanavati's antitrust claim.

Moreover, in reaching its conclusion the court apparently failed to consider the well-established distinction between an antitrust plaintiff's burden of proving the *fact* that he suffered injury, and the *amount* of damage sustained. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). "[Plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio*, 395 U.S. at 114 n.9 (italics in original). Given the difficulty of ascertaining what a "plaintiff's situation would have been in the absence of the defendant's antitrust violation," *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981), this Court has held that exact proof of the amount of damages is not required. *Id.* Rather, an antitrust plaintiff must only provide evidence sufficient to support a "just and reasonable estimate" of damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

Accordingly, petitioner submits that even if his damages were not sufficiently "quantified," in view of the jury's determination that he was injured by defendants' violation of the antitrust laws, he is entitled—at a minimum—to an award of nominal damages.

Awards of nominal damages in antitrust actions have been routinely approved by federal courts. *See e.g., U.S. Football League v. National Football League*, 842 F.2d 1335, 1377 (2nd Cir. 1988); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n.*, 666 F.2d 1130, 1147 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Knutson v. Daily Review, Inc.*, 468 F. Supp. 226 (N.D. Cal. 1979), *aff'd*, 664 F.2d 1120 (9th Cir. 1981). Ordinarily, a finding of the fact of damage caused by a violation of the antitrust laws "necessitates an assess-

ment of some amount of damages." *General Leaseways v. Nat'l Truck Leasing Ass'n*, 830 F.2d 716, 729 (7th Cir. 1987). Where a plaintiff proves that he has been injured but fails to satisfy his burden of proving the amount of damage sustained (which is apparently the basis of the court's decision below), nominal damages should be awarded. *See U.S. Football League v. National Football League*, 842 F.2d at 1377 (award of nominal damages appropriate after fact of damage was found but jury was unable to distinguish amount of losses caused by defendant's misconduct from amount caused by other factors); *Rosebrough Monument*, 666 F.2d at 1146-47 (finding as to fact of damage caused by tying arrangement reversed and case remanded to district court with directions to award plaintiff nominal damages in amount of $3). *Cf. General Leaseways*, 830 F.2d at 729 (affirmative defense of equal fault could preclude any monetary recovery despite proof of injury).

The issue of Nanavati's entitlement to an award of nominal damages is one of great import. Even though the court below agreed that he proved an antitrust combination existed[14] and even though he presented unequivocal evidence of harm resulting to him,[15] at the present time, no independent statutory basis for an award of attorney's fees exists, contrary to the dictates of Congress. Section 4 of the Clayton Act provides that a person injured as a result of conduct forbidden by the antitrust laws "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. Because recovery of treble damages is a prerequisite to an award of attorney's fees under Section 4, *Byram Concretanks, Inc. v. Warren Concrete Prod.*

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14. The Third Circuit found "that the Executive Committee is . . . a combination, at least with regard to the revocation of Nanavati's staff privileges." 857 F.2d at 118.

15. The evidence showed that Nanavati, as a result of the combination, was precluded from reading electrocardiograms on at least one day, where he normally read 25-30 EKG's per day and earned $5 apiece for such readings (A-109), and that he limited the impact of the combination only through the expensive resort to the state court which entered an injunction now made permanent. A-107, A-111, A-116.

Co. of N.J., 374 F.2d 649, 651 (3d Cir. 1967), Nanavati is precluded from receiving attorney's fees pursuant to this provision. Additionally, since injunctive relief in this action presently appears to be moot,[16] there is similarly no basis for an award of attorney's fees under Section 16 of the Clayton Act, 15 U.S.C. § 26.

While the recovery of only nominal damages may be considered as a factor in determining the amount of attorney's fees to be awarded, *Home Placement Service v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987), once treble damages are recovered by an antitrust plaintiff, the award of reasonable attorney's fees is mandatory. *See Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976).

The precise issue of an antitrust plaintiff's entitlement to recovery of nominal damages, and hence of attorney's fees, has not been addressed or decided by this Court. However, in other contexts the Court has indicated that an award of at least a nominal sum is appropriate. For example, in *Carey v. Piphus*, 435 U.S. 247, 266 (1978), an action seeking damages under Section 1983 of the Civil Rights Acts, 42 U.S.C. 1983, the Court held that a denial of procedural due process should be actionable for nominal damages without proof of actual injury. In reaching this conclusion, the Court considered: the nature of this right, noting that it is "absolute"; the "importance to organized society" that it be observed; and the purpose of Section 1983, the statutory provision under which plaintiffs sought to vindicate this right. With respect to the latter consideration, the Court, after initially finding that "the basic purpose" of § 1983 damages is "to compensate persons for injuries that are caused by the deprivation of constitutional rights," *id.*, at 254, nevertheless went on to recognize:

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16. Because an order permanently enjoining Nanavati's dismissal was finally entered in the prior state court proceedings, A-107, and because of the limited nature of the antitrust violation found by the court below, it seems impractical for him to seek injunctive relief in the present action.

> In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.

Id., at 258-59. *See also Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

Applying this analysis to the antitrust context leads inexorably to the conclusion that an award of nominal damages should be permitted where a plaintiff has proved the fact but not the amount of damage sustained; moreover, such an award should support the recovery of attorney's fees.

The Court has acknowledged that the Sherman Act, although obviously not afforded explicit constitutional protection, is a "charter of freedom" which "has a generality and adaptability comparable to that found in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). Congress intended that the antitrust laws be given broad, remedial effect. *See Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312-13 (1978). In establishing a private right of action against antitrust violations, Congress sought to deter anticompetitive practices. *Id.*, at 314. To this end it permitted the recovery of treble damages in actions brought under Section 4. "Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (italics in original). Moreover, the Court has noted that treble damages "make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit'" under the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977), quoting 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman).

Given the fundamental nature of the rights granted by the antitrust laws, the difficulty and expense inherent in the prosecution of actions seeking redress for antitrust violations, and the pivotal role that awards of reasonable attorney's fees play in enabling parties to vindicate these important rights, a clear pronouncement on this issue—by this Court—is sorely needed.

CONCLUSION

For these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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88-1068

No. -

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1988

SUKETU H. NANAVATI, M.D.,

Petitioner,

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL and EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE BURDETTE TOMLIN MEMORIAL HOSPITAL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION

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Suketu H. NANAVATI, M.D.,
Appellant in 86-5778,

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL, and Executive Committee of the Medical Staff of Burdette Tomlin Memorial Hospital and Robert J. Sorensen, Appellants in 86-5819.

Robert J. SORENSEN, M.D.

Suketu H. NANAVATI, M.D.

Nos. 86-5778, 86-5819.

United States Court of Appeals, Third Circuit

Argued July 13, 1987.

Decided Aug. 24, 1988.

Petitions for Panel Rehearing and Suggestion for Rehearing In Banc Denied Sept. 26, 1988.

David H. Weinstein (argued), William B. Lytton, Kohn, Savett, Klein & Graf, P.C., Philadelphia, Pa., for appellant Suketu H. Nanavati, M.D.

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Fitzpatrick, Philadelphia, Pa., for appellee Robert J. Sorensen, M.D.

Nina Wisznat Chase (argued), Carl J. Valore, Valore, McAllister, Westmoreland, Gould, Vesper & Schwartz, P.C., Northfield, N.J., Robert E. Paarz (argued), William M. Honan, Horn, Kaplan, Goldberg, Gorny & Daniels, Atlantic City, N.J., for appellees Burdette Tomlin Memorial Hosp.

Before HIGGINBOTHAM, BECKER and HUNTER, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

I. INTRODUCTION

This case arises out of a bitter and quite public personal feud between Suketu H. Nanavati, M.D., and Robert J. Sorensen, M.D., two physicians at Burdette Tomlin Memorial Hospital ("the Hospital"), a small Cape May Court House, New Jersey hospital. The feud has spawned two actions with numerous claims: (1) federal antitrust claims (each has sued the other on an antitrust theory); (2) reciprocal slander suits involving the hospital as well as the physicians; (3) race discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, and under 42 U.S.C. § 1981 (Dr. Nanavati is an American citizen born in India); and (4) reciprocal tortious interference with business claims. The litigation has raged in state as well as federal courts, trial and appellate, and has presented an extraordinary number of difficult legal issues in the fields of procedure, judgments, defamation, and antitrust. The jury, following a lengthy trial, left the opposing parties, whom it apparently thought "deserved each other," in a virtual wash: it awarded Dr. Nanavati a substantial antitrust verdict against the hospital which, when trebled, was almost equivalent to the substantial defamation and tortious business interference verdicts it awarded Dr. Sorensen. However, the district court set aside the antitrust award by a judgment n.o.v., and these cross-appeals followed.

The procedural history of the case is extraordinarily complex, and problems of subject matter jurisdiction flowed from the odd manner in which the case was pleaded. Technically, the parties brought two separate consolidated actions, and arguably the viability of certain pendent state claims in one action depended upon their relationship to federal claims in the *other* action. However, any putative jurisdictional problems were solved by the healing effect of Fed.R.Civ.P. 15(b) under which pleadings may be deemed amended to conform to proof. Given the liberal construction of Rule 15(b) and our assessment that all parties treated the consolidated actions as one unified action, we shall do the same. We therefore conclude that we have jurisdiction.

Turning to the defamation claim (and tortious interference claims, which have no independent basis and stand or fall with the defamation claims), we conclude that the award in Dr. Sorensen's favor cannot stand. First, we hold that four of the five allegedly slanderous statements made by Nanavati were protected statements of opinion. This conclusion follows from the fact that these statements were made to newspaper reporters (it is the publication to the reporters and not the republication in the newspapers that is in issue) who were fully conversant with the facts on which they were based, and who understood that Nanavati was presenting his own opinion on the question of the quality of medical care. Even outrageous statements of opinion are protected, and we will set aside the award in Dr. Sorensen's favor. Furthermore, we hold that the fifth statement, which was made to a hospital technician, who did not believe it and who passed it on to her superior solely for the purpose of protesting such scandalous remarks would not be recognized by New Jersey as inflicting sufficient injury to sustain an action for slander.

However, we will affirm the judgment n.o.v. on the antitrust claim. We must reach the antitrust claim because we hold that the plaintiff's antitrust and discrimination claims are not, as defendants contend, barred under the principles of res judicata by a state court judgment ordering Dr. Nanavati's hospital staff privileges restored. We will affirm because we

conclude that only the Executive Committee's revocation recommendation meets the contract, combination or conspiracy requirement of § 1, and that Nanavati failed to present evidence of damages for the five-day period during which the revocation decision excluded Nanavati from the Hospital.

Referring first to the jury's findings, the jury rejected the two principal premises of Nanavati's case, first by exonerating Sorensen, the alleged mastermind of the conspiracy and Nanavati's sole competitor in Cape May County, from any complicity; and second by concluding that Nanavati's expulsion from the Hospital staff was due to his unprofessional conduct (inability to get along with hospital staff, etc.). In legal terms, we conclude that: (1) Nanavati has presented no viable theory that would render the Hospital a co-conspirator, particularly in view of our decision in *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir.1984), *cert. denied*, 470 U.S. 1060, 105 S.CT. 1777, 84 L.Ed.2d 836 (1985); and (2) given that his staff privileges were reinstated by a state court injunction within five days of his ouster, Nanavati simply failed to present evidence of damages resulting from the recommendation by the Executive Committee (the sole remaining antitrust defendant) to revoke his staff privileges.

II. BACKGROUND FACTS AND PROCEDURAL OVERVIEW

Dr. Nanavati was born and reared in India and came to the United States in 1970 to continue his medical education. He became board certified in cardiology in 1977. After serving in a hospital in DuBois, Pennsylvania, he received medical privileges at Burdette Tomlin Memorial Hospital in Cape May Court House, New Jersey, moved to Cape May in 1979, and continued his practice there. At the time he arrived at the Hospital, its chief (and sole) cardiologist was Dr. Sorensen. Dr. Sorensen was board certified in internal medicine though not in cardiology.

As the Hospital's chief cardiologist, Sorensen had exclusive control over allocating electrocardiograms ("EKG"s), which were a substantial source of revenue. Soon after arriv-

ing at the Hospital, Nanavati demanded to share in these EKG readings, but was unsuccessful. Nanavati thereupon sought assistance from the Executive Committee of the medical staff. Then, only three weeks after his arrival, Nanavati launched a verbal attack upon Sorensen at a staff meeting, demanding to know why an "inferior[ly] qualified" physician should control the EKG readings. J.A. at 5159.

Nanavati was allocated EKG readings several days per week, but he remained unsatisfied. He proceeded to make internal complaints about Sorensen's handling of patient care and to demand more EKG readings. Eventually Nanavati made public his complaints about the quality of patient care at the Hospital. In his most serious accusation, he stated that Sorensen's incorrect reading of EKGs had led to the death of at least one patient. Nanavati also engaged in numerous quarrels with nursing personnel and members of the medical staff, arousing the ire of members of the staff by allegedly stealing patients, overbilling and prescribing unnecessary treatments.

Nanavati's comments touched off insulting comments by Sorensen. To the hospital staff, he referred to Nanavati, who is dark-skinned, as a "nigger," J.A. at 4029, and as "the Indian." J.A. at 4013. To the press, he accused Nanavati of being arrogant, backbiting and "nasty." J.A. at 3114. In addition, Sorensen resisted orders from the Executive Committee that he provide Nanavati with more days to read EKGs. The struggle between Nanavati and Sorensen not only became a cause celebre in the local newspapers but also received publicity in the Philadelphia Inquirer.

As we have intimated, a colossal legal struggle, both in the Hospital and outside, followed these verbal battles. In June of 1982, Nanavati filed a charge against the Hospital with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination because of national origin. In August of that year, charges were filed with the Executive Committee seeking Nanavati's dismissal from the staff. The Executive Committee, comprised of several members of the medical staff, was empowered under the Hospital's medical staff constitution and by-laws to make staff privileges recom-

mendations to the Hospital Board of Governors. In September 1982, Nanavati filed a second charge with the EEOC against the Hospital, this time alleging unlawful retaliation.

On November 12, 1982, after evidentiary hearings at which Nanavati was unrepresented by counsel, the Hospital Board of Governors terminated Nanavati's staff privileges for violation of hospital bylaws.[1] On November 17, 1982, Nanavati filed a complaint in New Jersey Superior Court, Chancery Division, which promptly issued a temporary restraining order reinstating Nanavati to the staff, on the ground that the Hospital had failed to follow its own bylaw procedures in terminating him. On April 15, 1983, the Board of Governors' Hearing Committee, appointed for the occasion in the wake of the court decision, recommended that the November 12 termination of Nanavati's staff privileges be affirmed. As part of its report on Nanavati, the Hospital compiled a "Black Book," which included numerous reports, letters and testimony on issues arising from the dispute between Nanavati and the Hospital staff. The Hospital released the Black Book to the press. In July 1983, the New Jersey court denied the Hospital's application to dissolve the restraining order, found that the Hospital had held *ex parte* hearings that "violated fundamental fairness," and entered an order remanding the case to the Hospital Board of Governors for further proceedings in which Nanavati could have the assistance of counsel.

The Hearing Committee conducted new hearings on July 15 and August 5, 1983. On October 21, 1983, the Hearing Committee again recommended termination of staff privileges and the full Hospital board approved that recommenda-

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1. The bylaw provision in question requires a staff doctor to:

> be of a temperament and disposition that will enable him to work in harmony with his colleagues on the Medical Staff; with the professional, technical, and other personnel in the hospital, and with the administration, accepting criticism without resentment and offering it in a spirit and manner that is constructive and devoid of offense and malice. . . .

J.A. at 3010.

tion. The litigation then resumed in state court with another motion by the Hospital to vacate the injunction against dismissal. Nanavati charged that the Hospital's new decision also was procedurally invalid because the Board was biased. After discovery and a hearing, the Superior Court again held for Nanavati. J.A. at 2485. The court concluded that the Board had been biased and that the hearing "was a nullity from beginning to end." *Id.* at 2502. It therefore refused to accord the Board's decision any deference, and proceeded to determine the merits of the Nanavati exclusion de novo.

The court found that Nanavati had indeed been disruptive at the Hospital. But it held that state law permitted termination of hospital privileges only if the disruption had an actual, negative impact on patient care. Under that standard, the court found dismissal from the staff inappropriate. It therefore entered an order permanently enjoining Nanavati's dismissal on the misconduct charges at issue. The order eventually was appealed to the New Jersey Supreme Court, which, although finding a great need for deference to the decisions of hospital administrators, affirmed.[2]

In addition to these state court and Hospital Board proceedings, Nanavati initiated federal court proceedings, filing a complaint on March 8, 1983 in the district court for the District of New Jersey. In this complaint, No. 83-0794, Nanavati pleaded several claims against the Hospital under the Civil Rights Act of 1866, 42 U.S.C. § 1981, and Title VII of

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2. The Supreme Court modified the Superior Court's statement of the applicable rule, holding that it is unnecessary for disruption to cause actual harm to patients, and that conduct that "'will probably have an adverse effect on patient care'" was required to uphold a termination. *Nanavati v. Burdette Tomlin Mem. Hosp.*, 107 N.J. 240, 526 A.2d 697, 704 (1987) (quoting *Sussman v. Overlook Hosp. Ass'n*, 92 N.J.Super. 163, 182, 222 A.2d 530 (Ch.Div.1966) *aff'd*, 95 N.J.Super. 418, 231 A.2d 389 (App.Div.1967)). Moreover, because of turnover of the Board of Governors' membership since the time of Nanavati's initial staff privileges revocation, the court decided that the Hospital should have one more chance to decide the matter impartially. Modifying the trial court's order in this one respect, the Supreme Court affirmed. However, the record does not reveal any additional action by the Hospital.

the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. The parties dispute whether the complaint also asserted these claims against Sorensen. In a separate count, Nanavati asserted state tort claims of defamation and tortious interference with business relations against Sorensen.

On May 10, 1984 Sorensen filed a federal court complaint against Nanavati, and the district court consolidated the two actions. This complaint, No. 84-1790, also included several claims for alleged antitrust violations, for slander, and for malicious interference with business relations. Nanavati thereupon counterclaimed, pleading similar claims against Sorensen. At trial, Nanavati amended his antitrust complaint to include the Hospital and the Executive Committee of the medical staff as defendants on the antitrust claim.

During pretrial proceedings, the district court granted partial summary judgment for Nanavati, dismissing Sorensen's antitrust claims and some of Sorensen's defamation claims. At the final pretrial conference, Nanavati withdrew his own defamation claims. During trial, the court dismissed Nanavati's Title VII claims on the ground that Nanavati, as a physician, was an independent contractor, not an employee covered by the Act. The surviving claims went to the jury in the form of a special verdict with questions labelled "special interrogatories" by the district court. *See* Fed.R.Civ.P. 49(a). The jury returned the following verdicts:

(1) in favor of the Hospital and the Executive Committee on Nanavati's § 1981 discrimination claim;

(2) in favor of Nanavati on his antitrust claims against the Hospital and the Executive Committee, but against him on his antitrust claim against Sorensen;

(3) in favor of the Hospital on the Hospital's defamation claim against Nanavati; damages were fixed in the amounts of $100,000 compensatory and $50,000 punitive damages;

(4) in favor of Sorensen on Sorensen's defamation claims against Nanavati; damages were fixed in the amounts of $100,000 compensatory and $500,000 punitive damages;

(5) in favor of Sorensen on Sorensen's tortious business interference claim against Nanavati; damages were fixed in

the amounts of $100,000 compensatory and $300,000 punitive damages; and

(6) in favor of Sorensen on Nanavati's tortious interference with business claim. The total damage verdicts were thus $1,050,000 in Nanavati's favor and $1,150,000 against him. Of the damages against him $1,000,000 were in favor of Sorensen and $150,000 were in favor of the Hospital. On motions for judgment notwithstanding the verdict, the district court set aside Nanavati's antitrust award. However, it upheld the defamation and business interference verdicts for the Hospital, the Committee, and Sorensen. These cross-appeals followed.

Nanavati appeals: 1) the denial of Nanavati's motion for judgment n.o.v. on Sorensen's defamation and tortious interference with business relations verdict; 2) the denial of Nanavati's motion for new trial on his § 1981 claim against the Hospital; 3) the denial of Nanavati's motion for new trial on his tortious interference claim against Sorensen; and, 4) the grant of the judgment n.o.v. in favor of the Hospital and the Executive Committee on Nanavati's antitrust claims. The Hospital, Executive Committee and Sorensen filed a cross-appeal, No. 86-5819. Because they are completely satisfied with the final judgment and object only to interlocutory rulings of the district court, we lack jurisdiction over their appeal. *Dalle-Tezze v. Director, OWCP,* 814 F.2d 129 (3d Cir.1987). However, we have treated the issues raised in the cross-appeal as alternative grounds for affirmance of the district court's judgment.

III. THE SLANDER CLAIMS

A. *The Allegations*

Sorensen and the Hospital received jury verdicts for slander based on Nanavati's remarks to the press and to an EKG technician, Anne O'Neil. Sorensen relied upon five such statements at trial. Four of the statements stemmed from press interviews referring to a 1981 incident in which a patient, Elsie Steinmeyer, died from an ailment that had been

diagnosed incorrectly. The fifth statement stemmed from Nanavati's 1985 conversation with O'Neil.

Several doctors read Mrs. Steinmeyer's EKG, including both Sorensen and Nanavati. The original EKG apparently were difficult to read and had suggested to all the doctors, except Nanavati, that Mrs. Steinmeyer suffered from a myocardial infarction. This was the more common and therefore the more "conservative" interpretation. Nanavati alone read the EKG as suggesting that the patient suffered from a pulmonary embolism, although he was not certain. Nanavati was the consulting physician, and was on call at the time she died. Despite his diagnosis, however, he had not prescribed treatment for a pulmonary embolism, and was criticized in a subsequent medical investigation of the whole affair, published in the Hospital's Black Book, for failing to press his diagnosis.

A third doctor, Mrs. Steinmeyer's treating physician, was primarily responsible for her care, and made the choice to follow the "conservative" interpretation. Sorensen's only involvement with the patient was his reading of one of her early EKG. An autopsy after Mrs. Steinmeyer's death revealed that the cause of her death had indeed been a pulmonary embolism. In a later independent review of the EKG, Dr. Meister, a cardiological expert, concluded that Sorensen in no way had been negligent in reading the EKG. The Meister report appeared in the Hospital's Black Book.

The following specific statements, made by Nanavati to a reporter inquiring about Dr. Meister's support of Sorensen's reading of the EKG, are at issue in Hospital's and Sorensen's slander claims against Dr. Nanavati:

1. "The conservative interpretation probably cost the patient her life."

2. "The correct interpretation [of the EKGs] would have saved her life because a pulmonary embolism is fully treatable if it is diagnosed and quickly handled."

3. "How can Dr. Meister be right when the patient is dead?"

Moreover, referring generally to the entire incident, Nanavati stated:

4. "I was concerned about everyone's life after that, I saw that man [the patient's husband] and I had to cover up for this doctor [Sorensen]."

5. "I never knew medicine could be so shallow."

O'Neil testified at trial that Nanavati, in 1985, in a private conversation between the two, had referred to Sorensen as a

[6.] "senile old doctor that had been there [at the Hospital] for twenty years killing patients."

The Hospital also sued Nanavati for slander, citing two statements made by Nanavati to the reporters in its slander claim. The defamation claim made by the Hospital against Nanavati relied in part on statement #1 (the "conservative interpretation" statement) and statement #5 (the "shallow medicine" statement).

As a result of Nanavati's allegedly slanderous remarks, an article appeared in the Atlantic City Sun on May 11, 1983. However, Sorensen and the Hospital sued for slander only, basing their claims on what was said to the reporters and not for libel based on the published report.

B. *Jurisdiction*

The procedural history of the defamation claims is complex. Technically, the case is comprised of two separate consolidated actions.[3] *See supra* page 99. Although consolidation was perfectly appropriate here, we note that few of the formal

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3. Fed.R.Civ.P. 42 provides in relevant part:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

requirements of maintaining two separate actions were observed by the parties. As a general rule, consolidation is a procedural device, not a means for joining new parties or claims to old actions. It does not serve the purpose of circumventing the established procedures for amending complaints or joining new parties. *See Cole v. Schenley Industries*, 563 F.2d 35 (2d Cir.1977). However, it is apparent that all parties and the district court did indeed treat the consolidated cases as one large case.[4]

In the interests of fairness and efficiency, given the uncontested treatment in the district court, we likewise consider this case as a unified action. *See* Fed.R.Civ.Pro. 1 (rules of procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action"). We therefore will construe Fed.R.Civ.P. 15(b), which allows for amendment of pleadings to conform to the evidence, quite broadly and conform the pleadings of Civil Action No. 83-0794 (Nanavati's initial suit against Sorensen, the Executive Committee and the Hospital) to reflect the nature of the action and proofs. Given our determination *infra* that the district court possessed the power to have tried this case as a single action, and that at least for jurisdictional purposes the parties treated it as such, liberal treatment seems appropriate. *See In Re Meyertech Corp.*, 831 F.2d 410, 422-23 (3d Cir.1987) (treating issue tried by consent, squarely presented and foisting no surprise on any party, as included in constructively amended complaint even though no technical amendment was ever made); 6 C. Wright & A. Miller, *Federal Practice and Procedure, § 1494 (1971); cf. Schultz v. Cally*, 528 F.2d 470, 474-75 (3d Cir.1975) (refusing to apply Rule 15(b) to constructively

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4. Perhaps the best evidence of this tendency to accrete the two separate actions is Nanavati's attempt, once the trial was already underway, to join the Hospital and Executive Committee as defendants to the antitrust claim. Although the Hospital and the Executive Committee protested on the grounds of prejudice (*see infra* n. 19 for a discussion of the last minute addition of these defendants to the antitrust claim), no one complained that the Hospital was not even a party to the second suit in which the antitrust claim was presented.

amend pleadings where doubt existed as to whether defendants would have agreed to the existence of federal question jurisdiction and where case was tried in district court under a mistaken theory of diversity).

[1, 2] Nanavati contends that the district court lacked subject matter jurisdiction over Sorensen's slander claim. He argues that because the state claims were not properly connected to any federal claim in the action and because all the parties are residents of New Jersey, federal jurisdiction is lacking.[5] Given our willingness to consider the actions below as constructively amended, we find no jurisdictional defect.[6] We hold that Sorensen's defamation claims were properly pendent and ancillary to federal claims in the action.[7]

In *Ambromovage v. United Mine Workers of America*, 726 F.2d 972, 989-91 (3d Cir.1984), this court set out a tripartite

5. We note that in the district court, Nanavati advocated just the opposite, claiming that the existence of subject matter jurisdiction existed over all the state claims. *See* J.A. at 159-161. Nanavati's strategy, however, is of no consequence given our mandate to determine independently our own subject matter jurisdiction. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-42, 106 S.Ct. 1326, 1331-32, 89 L.Ed.2d 501 (1986); *Lovell Mfg. v. Export Import Bank of the United States*, 843 F.2d 725, 729 (3d Cir.1988).

6. We note that this disposition obviates the need to address the many intricate and tantalizing procedural questions (including the recognition of pendent party jurisdiction) presented by Nanavati's clever attempts at this late stage to revivify the separate natures of the two actions.

7. Pendent jurisdiction allows the plaintiff to append related state claims to his federal causes of action. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Ancillary jurisdiction typically involves a claim other than that of the plaintiff, such as a claim by a defending party or another whose rights are in jeopardy. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). Although many courts and scholars question whether there is in truth any real distinction between ancillary and pendent jurisdiction (the Supreme Court specifically avoided answering this question in *Owen*) the functional difference stems from the fact that whereas pendent claims supplement plaintiff's claims, ancillary claims, supplement counterclaims and cross claims. In *Ambromovage v. United Mine Workers of America*, 726 F.2d 972, 989-90 (3d Cir.1984), this court held that the two tests are identical, at least for the purpose of federal question jurisdiction.

test by which such supplemental (ancillary and pendent) jurisdiction should be judged. First, pursuant to *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966), the court must possess constitutional power to hear the claim. Second, the extension of jurisdiction cannot contravene or undermine federal statutory law. Third, the court must examine whether, in the exercise of its appropriate discretion, the claim is of the type to which supplemental jurisdiction should be extended. *Ambromovage,* 726 F2d at 989-91.[8]

[3] Our inquiry here revolves soley around the first prong of the test. The question of power is constitutional, governed by the limitations of Article III. To satisfy the constitutional prong of the test, we must determine whether a substantial federal claim is present and whether the state and federal claims derive "from a common nucleus of operative fact" such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Gibbs,* 383 U.S. at 725, 86 S.Ct. at 1138.

In trying to set out standards for supplemental jurisdiction and to apply them consistently, we observe that, like unhappy families, no two cases of supplemental jurisdiction are exactly alike. The principle that we glean from the cases is that mere tangential overlap of facts is insufficient, but total congruity between the operative facts of the two cases is unnecessary.[9] *See Skevofilax v. Quigley,* 810 F.2d 378, 385 (3d Cir.) (in banc) (district court has ancillary jurisdiction over a cross-claim for garnishment by a judgment creditor against a nonparty to the original lawsuit, where the non-party may

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8. This last prong does not implicate the court's power to entertain the suit, but rather addresses the question whether the district court, as a matter of convenience, fairness and federalism should address the state law claims. *See Sparks v. Hershey,* 661 F.2d 30 (3d Cir.1981).

9. We note that this case has been through a long trial and that the parties, as well as the federal court system have expended much time and resources. Obviously, however, arguments based on efficiency cannot overcome a lack of constitutional power to hear the case, *see, e.g., Tully v. Mott Supermarkets, Inc.,* 540 F.2d 187, 196 (3d Cir.1976).

owe the judgment debtor an obligation to indemnify against the judgment) *cert. denied,* _____ U.S. _____, 107 S.Ct. 1956, 95 L.Ed.2d 528 (1987); *Ambromovage,* 726 F.2d at 992 (holding that the district court had power to hear defendant's counterclaim raising a state law set-off in conjunction with plaintiff's federal question claim because a key factual question which "implicate[d] the entire factual matrix" of the case was common to both the federal claim and the ancillary counterclaim); *Cf. PAAC v. Rizzo,* 502 F.2d 306 (3d Cir.1974), *cert. denied,* 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975) (holding that a defamation claim by a city agency director against the mayor was insufficiently related to the federal question of the mayor's ability under the federal anti-poverty law to terminate the agency director, but providing no indication of the facts in that case or its factual relationship to the termination claim, other than to conclude that it was distinct).

We conclude that Sorensen's slander claim (which arose out of five statements made by Nanavati) emerges from the same nucleus of operative fact as the federal claims. As in *Ambromovage,* a critical background fact (the enmity between the two physicians) is common to all claims. For instance, Sorensen's slander claim is ancillary to Nanavati's antitrust claim. In his antitrust claim, Nanavati challenged the revocation of his staff privileges and alleged that the defendants had engaged in a group boycott. Nanavati's discussions with the press as well as the substance of his allegations against Sorensen would constitute relevant facts for both sides. Nanavati could use the Steinmeyer incident as evidence of defendants' unconcern for patients (thereby exposing defendants' asserted motive for excluding Nanavati as pretextual). In defense of the antitrust claim, Sorensen, the Hospital, and the Executive Committee would be expected to present evidence demonstrating the propriety of their motivation for excluding Nanavati—that Nanavati was impossible to work with and that he disrupted the amicable and supportive environment conducive to high quality patient care. Sorensen, the Hospital, and the Executive Committee could use Nanavati's statements to the press to argue that Nanavati was subversive and difficult.

[4] We therefore believe that the district court was eminently reasonable in perceiving that all the facts of the slander incidents would be before it in any case and that Sorensen's claim was properly related to the federal questions.[10]

C. Fact/Opinion

[5] Having found that jurisdiction exists, we must reach the merits of Sorensen's slander claim. We conclude that Nanavati's comments to the reporters fall within the realm of constitutionally protected opinion.[11] The Supreme Court of

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10. Furthermore, we hold that Sorensen's and Nanavati's tortious interference with business claims were properly appended to this action. As noted *infra* in Part IV, Sorensen's tortious interference claim is merely duplicative of his slander claim. Because we have jurisdiction over the slander claim, we have jurisdiction to address the claim of tortious interference. Although the question was raised by no party, we hold that Nanavati's tortious interference claims were pendent to his antitrust claim because they clearly arose out of a common nucleus of operative fact.

11. In deciding this question of defamation we must explore the murky boundary between state tort law and federal constitutional law. In an oft-quoted passage, this court explained in *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir.1985), *cert. denied*, 474 U.S. 864, 106 S.Ct. 182, 88 L.Ed.2d 151 (1986):

> Although replete with First Amendment implications, a defamation suit fundamentally is a state cause of action. . . . An adjudication of a defamation case involves both state and federal law inquiries. A court must determine: (1) whether the defendants have harmed the plaintiff's reputation within the meaning of state law; and (2) if so, whether the First Amendment nevertheless precludes recovery.

Id. at 1077 (quoting *Steaks Unlimited v. Deaner*, 623 F.2d 264, 269-70 (3d Cir. 1980)). *See Jenkins v. KYW*, 829 F.2d 403, 405 (3d Cir.1987) (quoting *Marcone*). Therefore, we first must consider whether New Jersey would allow a defamation action under the circumstances of this case. If we believe that New Jersey would recognize a defamation action, then we may examine whether constitutional protections nevertheless would defeat that action. In the case of New Jersey, which has consciously adopted constitutional principles in deciding this question, *see Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir.1987) (noting that New Jersey has intertwined the fact/opinion distinction with federal constitutional law, and has relied upon the Restatement approach to draw the distinction), the two inquiries may tend to collapse. Because we prefer not to reach the constitutional question unnecessarily, and at all events because we are bound by *Dunn, discussed infra*, we will decide this case on the basis of New Jersey

New Jersey has held that "statements of opinion are entitled to constitutional protection no matter how extreme, vituperous, or vigorously expressed they may be." *Kotlikoff v. The Community News*, 89 N.J. 62, 444 A.2d 1086, 1091 (1982). The *Kotlikoff* court cited the famous dicta of the Supreme Court:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3006-07, 41 L.Ed.2d 789 (1974). *See also Diary Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125, 516 A.2d 220, 231 (1986) (citing *Kotlikoff* and *Gertz*).

The decision to shield opinion from liability for defamation represents an attempt to balance the constitutional protection of speech with the rights of individuals not to be defamed. New Jersey favors the interests of free speech even though statements of opinions may cause injury, because, unlike false statements of fact, opinions are more likely to contribute to a robust debate. *See Kotlikoff*, 444 A.2d at 1091

Recognizing this doctrine is, of course, only the beginning; the harder task is actually differentiating potentially unprotected false statements of fact from protected opinion. The district court recognized that opinion is protected but rejected Nanavati's arguments that his statements constituted opinion. Instead, relying heavily on the Restatement (Second) of Torts § 566, comment b (1977), the district court held that Nanavati's statements were unprotected "mixed" opinions because they implied the existence of undisclosed facts. For the reasons that follow, we will reverse that determination.

Recently, this court confronted the question of how New Jersey differentiates between fact and opinion. We determined that New Jersey would follow the approach of the Restatement (Second) of Torts in determining the distinction.

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defamation law.

See Dunn v. Gannett New York Newspaper, Inc., 833 F.2d 446 (3d Cir.1987).

According to the Restatement approach that we applied in *Dunn*, and which the New Jersey Supreme Court has approved in *Kotlikoff*, 444 A.2d at 1089, and *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 516 A.2d 220, 231 (1986), "pure" opinions are either statements which provide the underlying factual assumptions of the speakers or statements made where those assumptions are known to the listener. Such "pure" opinion is fully protected. Mixed opinions, however, "imply the existence of defamatory unknown facts that justify the opinion expressed." R. Smolla, *Law of Defamation*, § 6.04[3], at 6-17 (footnote omitted); *See* Restatement (Second) of Torts § 566, comment c (1977). Where facts upon which the opinion is based are not disclosed and the listeners have no basis for knowledge, such "mixed opinion" does not merit absolute protection.

In applying the Restatement approach, therefore, the court must examine a statement in context.[12] The examination of context itself looks at many factors. Relevant here are considerations of the nature of the discussion in which the allegedly defamatory statements were made. In *Kotlikoff*, the court analyzed a letter to the editor of a newspaper and concluded that allegations of a "huge coverup" and a "conspiracy" were not, in context, allegations of criminal activity, but merely "pejorative rhetoric." 444 A.2d at 1091. Statements surrounded by other statements of opinion (such as a debate on a controversial topic) are also likely to be understood as opinions.

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12. We note that the Restatement's approach is not the only means of analyzing the fact/opinion dichotomy, and the New Jersey Supreme Court has so recognized. *See Kotlikoff*, 444 A.2d at 1090-91. In *Dunn*, we applied the Restatement because it answered the fact/opinion question completely. *See* 833 F.2d at 453 ("the Restatement format is the appropriate route to follow *here*") (emphasis added). However, we also noted that New Jersey has incorporated many constitutional principles and decisions in ascertaining the distinction between fact and opinion. *Id.* Here, as in *Dunn*, we find that we need not, however, venture beyond the Restatement, which New Jersey has adopted, to determine that the statements are indeed protected opinion.

The key factor in analyzing the statements at issue are the nature of the listeners' understanding. The circumstances of Nanavati's conversation with the reporters strongly favor treating Nanavati's statements as protected "pure" opinion. It is essential to emphasize that this is an action for *slander* for speech to reporters, and *not libel* for the published article.

The reporters to whom the alleged slander was spoken knew of the facts regarding this long standing and well-publicized feud. When Nanavati spoke to the reporters, the controversy between Nanavati and Sorensen had been raging in public for several years and the Hospital recently had released a comprehensive report of its investigation of Nanavati (the Black Book). That report included a discussion of the allegedly misread EKG, and a copy of Dr. Meister's report. The report also included a lengthy discussion of Nanavati's troubles with the Hospital and Nanavati's complaints about Hospital practices. That the reporters to whom Nanavati made his statements were aware of the existence of the Black Book and its contents is evidenced by their discussion of it in the articles. Thus, Nanavati addressed knowledgeable listeners who were aware that Dr. Meister had absolved Sorensen of any negligence. The reporters were obviously aware that the speaker was presenting his opinion of Mrs. Steinmeyer's death and that other doctors and the Hospital held firmly opposing views. Nanavati's interpretation of events contributes to a robust debate on matters of public importance, namely the competence of medical care at the hospital.

We will briefly discuss each allegedly defamatory statement in turn. Statement #1, that "conservative interpretation [of the EKG] probably cost the patient her life," and Statement #2, that the "correct interpretation would have saved the patient's life because a pulmonary embolism is fully treatable," on the facts of this case are both protected opinions under New Jersey law. Both statements assert exactly the same proposition: that had Sorensen diagnosed a pulmonary embolism, the patient would have lived. It is undisputed that Sorensen did not diagnose a pulmonary embolism, and Nanavati's statement provides the factual basis for the conclusion that a correct diagnosis would have saved the patient's life; namely that "a pulmonary embolism is fully treatable."

Beyond this, the only possible assertion in the statement is that a correct diagnosis by Sorensen, as opposed to a correct diagnosis by Nanavati, would have been acted upon. This is simply not defamatory. Furthermore, because the reporters were familiar with the long running dispute among the parties and knowledgeable about the underlying facts, the Restatement approach would protect these two statements as opinion.

Nanavati's question. statement #3 "[h]ow can Dr. Meister be right when the patient is dead?" refers only to whether Meister was right to conclude that Sorensen was not at fault, and its rhetorical quality smacks of opinion. It also states explicitly the undisputed fact, the death of the patient, on which Nanavati based the view that Meister was wrong. However silly the statement may be as a refutation of Meister's judgment, the statement is clearly opinion.

Nanavati's statement #4, that the Steinmeyer affair made him concerned about the lives of other patients and forced him to "cover-up" in discussions with the patient's husband seems at first blush, the most problematic of all the statements. Yet, all the statement conveys (albeit histrionically) is Nanavati's opinion that Sorensen was negligent. As noted above, the facts surrounding the incident were well known to the listeners, as evidenced by the articles.

Finally, we consider Nanavati's statement, "I never knew medicine could be so shallow," assigned as a basis of liability only by the Hospital. To the extent Nanavati's meaning can be discerned from the context of the conversation, it appears that Nanavati was conveying his disgust for the pettiness of his adversaries, and his factual basis for believing his colleagues lacked depth had been disclosed to the listeners.

In sum, we find that New Jersey would not allow recovery for slander for the aforementioned statements, given the circumstances under which these statements were uttered.

D. *The O'Neil statement*

[6] While testifying at trial, an EKG technician, Ann O'Neil, provided surprise testimony that Nanavati called

Sorensen a "senile old doctor that had been there [the Hospital] for 20 years killing patients." Trial Transcript 6/30/86 p. 160. The statement was uttered in the course of a November 1985 conversation in which Nanavati complained to O'Neil that Sorensen had a locked drawer in which to keep his prescription pads but that he, Nanavati, did not. O'Neil testified that she was the only one to hear the comment alleging Sorensen's incompetence and senility and did not believe it. Additionally, she testified that when she challenged Nanavati, he asserted: "That's not opinion, that's facts." *Id.* at 159. Finally, O'Neil testified that she wrote the statement down and two days later gave it to her superior at the Hospital.

Upon hearing O'Neil's testimony, Sorensen successfully moved for leave to amend, over objection, to add this statement as a ground for his defamation claim. Nanavati claims that the mid-trial amendment was an abuse of discretion. He also submits that the statement to O'Neil caused no injury. In our view, the injury alleged here borders on the metaphysical. The facts indicate that no one who heard the slander believed it, and those who repeated the slander did so only to express outrage at the speaker. The entire situation seems more like a fiendish law school hypothetical gone amok than a compensable claim for slander. We believe that New Jersey would not compensate for slander under these facts. *See Sisler v. Gannett New York Newspaper, Inc.*, 104 N.J. 256, 516 A.2d 1083 (1986). Therefore we need not reach the question whether the court abused its discretion by permitting Sorensen to add this claim for slander so late in the proceedings.

In sum, we hold that statements #1-5 constitute protected opinion and that New Jersey would not permit recovery upon them under the circumstances of this case. The defamation awards will therefore be set aside.

IV. IS THE TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS CLAIM DUPLICATIVE OF THE SLANDER CLAIMS?

We next consider Sorensen's judgment against Nanavati for tortious interference with Sorensen's business relations.

Nanavati argues that the tortious interference claim was entirely duplicative of the slander claims. He relies upon the Joint Final Pretrial Order, in which Sorensen explained that Nanavati had caused the interference "by making repeated false allegations of discrimination, improper patient care, improper practices, and inadequate qualifications." Joint Final Pretrial Order, May 12, 1986, at 52. Sorensen responds that the interference claim was based on far more than the specific acts of slander which constititued the slander claim. Sorensen does not deny, however, that the entire tortious interference claim was based on allegedly false statements of fact.

[7] We conclude that the judgment on Sorensen's tortious interference claim must be set aside. If Sorensen wished to include in the claim acts of false allegations beyond those in the slander claim, he had a duty to set those forth with particularity. New Jersey courts have emphasized that the defenses applicable to defamation claims retain their full status for tortious interference claims if such tortious interference claims are based on verbal conduct. *See, e.g., Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 117 A.2d 889, 894-95 (1955); *Middlesex Concrete Products v. Carteret Ind. Ass'n*, 68 N.J.Super. 85, 172 A.2d 22 (App.Div.1961). Similarly, the United States Supreme Court recently indicated that the constitutional guarantees protecting speech against libel claims retain their full force regardless of the nature of the cause of action. *Hustler Magazine v. Falwell*, — U.S. —, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). If those privileges and constitutional protections are to have meaning, a plaintiff must be required to set forth allegedly actionable statements with particularity. *See* J.A. 146, 152-54 (district court's Memorandum Opinion dated 4/8/86 granting summary judgment in favor of Nanavati, partly because Sorensen failed to plead his defamation claim with specificity; grant of summary judgment later reconsidered to allow Sorensen to allege defamation claims arising out of May 11 article. J.A. at 190.) *See, e.g., National Bowl-O-Mat Corp. v. Burnswick Corp.*, 264 F.Supp. 221 (D.N.J.1967).

Here, Sorensen set forth no actionable statements either

in his pleading or in his proposed pretrial order beyond those set forth in the slander claim. We conclude that he thereby limited his tortious interference claim to the same statements he set out in his defamation claim. *Cf. Bainhauer v. Manoukian*, 215 N.J.Super. 9, 520 A.2d 1154, 1175 (App.Div.1987) ("the malicious interference count . . . is expressly predicated on precisely the same facts as are alleged in the defamation count. Proof or failure of proof of the operative facts of the defamation count would, therefore, completely comprehend the malicious interference cause.")[13] Our rejection of liability for those statements therefore applies also to the tortious interference claim, and the judgment in favor of Sorensen on that claim therefore must be reversed.[14] Any other result would impermissibly allow Sorensen to circumvent the statute of limitations and, more importantly, the constitutional protections for defamation.

V. CLAIM PRECLUSION

A. *The Discrimination Claims*

In his initial complaint, Nanavati charged the Hospital and Executive Committee with discrimination based on his race and national origin, asserting claims under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The district court dismissed the Title VII claim on the ground that Nanavati was an independent contractor, and hence was not covered by Title VII. The jury found against Nanavati on his § 1981

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13. In special interrogatories to the jury, the district court attempted to avoid duplication of damages between the defamation and interference with business relations claims. This initiative, however, did not cure the fundamental defect of reliance on statements not specifically set out in the pleadings and therefore not subject to constitutional protection.

14. Nanavati also presented a tortious interference with business relations claim, which the jury rejected. Nanavati seeks a new trial because of allegedly faulty evidentiary rulings by the district court in connection with these claims. We hold that the district court did not abuse its discretion in making those rulings. *See Nanavati v. Burdette Tomlin Memorial Hosp.*, 645 F.Supp. 1217 at 1228 (1986).

claim. Nanavati has not appealed the district court's dismissal of the Title VII claim, but he has appealed the district court's refusal to grant a new trial on his § 1981 claim, maintaining that the evidence of discrimination is uncontradicted. However, before reaching the merits of Nanavati's appeal, we must confront the contention of the Hospital and Executive Committee that his claim is barred by the doctrine of res judicata.

Nanavati's original complaint in state court alleged that his dismissal was "the result [*inter alia*] of discrimination." Following the filing of his federal complaint, Nanavati sought to remove the discrimination claim from state to federal court. After originally granting Nanavati's request and subsequently recognizing that a plaintiff has no right of removal, the district court reconsidered and denied the petition *nunc pro tunc*. In the meantime, Nanavati had moved in state court to amend the complaint to drop the claim of discrimination. The Hospital and Executive Committee responded to Nanavati's motion to dismiss that fairness required dismissal only with prejudice. The record does not indicate that Nanavati objected. Without holding a hearing, the state trial court agreed with the Hospital and Executive Committee and entered an order dismissing the case with prejudice. Nanavati never appealed that order.

The elements of the § 1981 claim are, undoubtedly, subsumed within the state law discrimination claim. The district court nonetheless rejected the Hospital and Executive Committee's claim of res judicata on the grounds that Nanavati had not had a "full and fair opportunity to litigate the caim or issue" in the New Jersey courts. Nanavati attempts to buttress this rationale with the somewhat cryptic comment that the state court finding was unfair.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480-82, 102 S.Ct. 1883, 1896-98, 72 L.Ed.2d 262 (1982), the Supreme Court indeed recognized the general common law rule that res judicata does not apply to judgments which the party did not have a fair opportunity to litigate. The Court also recognized the longstanding principle that, whatever the contours of this common law doctrine, a federal court's decision

to give preclusive effect *vel non* to a state court judgment is not discretionary. *Id.* at 482, 102 S.Ct. at 1898. The Court held that under 28 U.S.C. § 1738 a court can refuse to afford claim preclusive effect to a state court judgment only if the state itself would not afford preclusion or if error in the prior judgment rises to the level of a violation of the constitutional right to due process. *See also Allen v. McCurry,* 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

[8] In this case, Nanavati has not contended either that New Jersey would not itself recognize the prior judgment or that the New Jersey court's procedures rise to the level of a constitutional violation. At all events, New Jersey accords full claim preclusive effect to default judgments, *see Joan Ryno, Inc. v. First National Bank,* 208 N.J.Super. 562, 506 A.2d 762, 766 (App. Div. 1986), so that the mere failure of the court to hold a hearing in this case is not dispositive. Furthermore, Nanavati did not object to the dismissal of the complaint with prejudice. Even if the action of the New Jersey court was in error or an abuse of discretion, New Jersey provided Nanavati with a remedy for this error in the form of an appeal or a motion for reconsideration, thus we do not perceive that a due process violation occurred. This case is squarely controlled by *Kremer.* We therefore hold that Nanavati's § 1981 claim is barred by res judicata; hence we will affirm the district court's denial of Nanavati's new trial motion directed to that point.

B. *The Antitrust Claims*

1. Introduction

In a counterclaim and through subsequent amendment to the counterclaim at trial, Nanavati alleged that Sorensen conspired with the Executive Committee and the Hospital to boycott Nanavati's services in two ways: first, they allegedly conspired to revoke his hospital staff privileges; and second, they allegedly discouraged doctors from referring cardiological patients to Nanavati. The Hospital and Executive Committee contend that Nanavati's antitrust claims should have been precluded because of his earlier action in state court. Underlying the contention is New Jersey's antitrust

statute, which is virtually identical to that of federal law, providing the same availability of treble damages and attorneys' fees. New Jersey Antitrust Act, N.J. S.A. §§ 56:9-1 to 56:9-19 (1986). The statute even provides on its face that courts should construe it "in harmony with ruling judicial interpretations of comparable Federal antitrust statutes." § 56:9-18. The only significant difference between the federal and state antitrust laws is New Jersey's lack of an interstate commerce requirement, which could only benefit Nanavati.

[9, 10] Res judicata bars not only claims that were raised in a previous proceeding but also claims that could have been raised. *See Federated Dep't Stores, Inc. v. Moitie,* 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981); *Gottdiener v. Roxbury Township,* 2 N.J. Tax 206 (1981) (citing *Bowers v. American Bridge Co.,* 43 N.J. Super. 48, 127 A.2d 580 (1956), *aff'd,* 24 N.J. 390, 132 A.2d 28 (1957) (applying Pennsylvania law)); *see generally* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4470, at 687–88 (1981). In determining the claim preclusive effect of a prior state court judgment in federal court, 28 U.S.C. § 1738 requires that a federal court look to the judgment's claim preclusive effect in state court. *Kremer,* 456 U.S. at 481-82, 102 S.Ct. at 1897–98. This rule applies even when the claim that might be precluded is within the exclusive jurisdiction of a federal court, such as federal antitrust claims. *See Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 379-86, 105 S.Ct. 1327, 1331-35, 84 L.Ed.2d 274 (1985).

However, a state court may never have an opportunity to address the question whether an exclusively federal claim is barred by a prior state judgment because a state court has no jurisdiction over such a claim. In *Marrese* the Supreme Court held:

> [w]ith respect to matters that were not decided in the state proceedings, we note that claim preclusion generally does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter

> jurisdiction of the courts . . . ." Restatement (Second) of Judgments § 26(1)(c) (1982). If state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will *not* have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts.

Id. at 382, 105 S.Ct. at 1333 (footnote omitted) (emphasis in original). Because we determine that New Jersey claim preclusion does not apply to claims over which the initial New Jersey court lacked jurisdiction, i.e., to claims which *could not* have been brought in New Jersey state court, we need not reach the question whether the factual nexus of Nanavati's federal antitrust claim is sufficiently related to the claims tried in state court that New Jersey's res judicata-based "entire controversy doctrine" would apply.

2. Does New Jersey Claim Preclusion Contain a Jurisdictional Requirement?

Following the Supreme Court's direction in *Marrese,* we must consider whether New Jersey's claim preclusion rules would apply where, as here, the first court lacked jurisdiction over the claim advanced in the second court. *See Marrese,* 470 U.S. at 382, 105 S.Ct. at 1332-33; *Eichman v. Fotomat Corp.,* 759 F.2d 1434, 1437 (9th Cir.1985) (determining that federal courts must apply California preclusion law after *Marrese* and concluding that in California "the court rendering the prior judgment must have had jurisdiction to hear such claims" in order to preclude them); *id.* at 1440 (Kennedy, J., concurring) (maintaining that the jurisdictional requirement "is a rule of near universal application").

Because the exact question (involving a claim of exclusive federal jurisdiction) could not have been presented to the state court, this question has been described as "nearly metaphysical" in nature, *Marrese v. American Academy of Orthopaedic Surgeons,* 628 F.Supp. 918, 919 (N.D.Ill. 1986) (on remand from the Supreme Court); *see* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4470, at

675 (1981 & Supp.1987)[15] Nevertheless, we must examine the relevant case law to glean an understanding of whether New Jersey's claim preclusion law includes a jurisdictional requirement.

The general rule to which we have adverted is expressed in § 26(1)(c) of the Restatement (Second) of Judgments, *viz.*, that claim preclusion does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy . . . because of the limitations on the subject matter jurisdiction of the courts. . . ." Restatement (Second) of Judgments § 26(1)(c) (1982). Although the Hospital and Executive Committee concede that there is no New Jersey case on point, they argue forcefully that New Jersey would not follow the Restatement rule on the basis of New Jersey cases that demonstrate the breadth of that state's entire controversy doctrine, a breadth sufficient, they submit, to override the Restatement rule.

Giudice v. Drew Chemical Corp., 210 N.J.Super. 32, 509 A.2d 200 (App.Div.), *certif. granted and remanded on other grounds*, 104 N.J. 465, 517 A.2d 448, *certif. denied*, 104 N.J. 465, 517 A.2d 449 (1986), provides an indication of the breadth of the entire controversy doctrine. In *Giudice*, the

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15. The impressive majority and dissenting opinions of the Seventh Circuit in *Marrese v. Am. Academy Ortho. Surgeons*, 726 F.2d 1150, 1161-62 (7th Cir.1984) (opinion of Posner, J., for the court) (en banc); *Id.*, at 1173-83 (opinion of Cudahy, J. dissenting), recount the policy reasons for and against the use of res judicata in this context. *See generally* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 4470, at 241-46 (Supp.1987). Favoring application of res judicata is the policy that all claims arising out of a single transaction should be resolved in a single suit, particularly where, as here, the state action is virtually identical to the federal action. Militating against its application is the incentive this rule gives to plaintiffs to bring all their claims in federal court, thus inappropriately burdening federal courts with more cases and more decisions about state law. In addition, although the rationale does not apply here, Judge Cudahy noted that, because federal causes of action are often more complex than their state counterparts, this rule may unfortunately require litigation of complex claims when a dispute could be resolved more easily via the state courts. *See Marrese*, 726 F.2d at 1182.

plaintiff, who had been dismissed from his job, brought a defamation action in New York, and then brought a wrongful discharge suit in New Jersey. The court dismissed the later suit on the basis of claim preclusion despite acknowledging that New York probably would not recognize a wrongful discharge cause of action similar to that in New Jersey. *Giudice* thus indicates the willingness of New Jersey courts to require the plaintiff to select the forum with the widest possible relief.

We note, however, that *Giudice* does not involve a question of the *jurisdictional* competency of the former court. The New York court in *Giudice* was empowered to hear the wrongful discharge suit, but would have dismissed the claim because the applicable New York substantive law had not abrogated the employment at will doctrine. Thus, the plaintiff was not prevented from bringing the claim, but simply faced a small prospect of succeeding in the New York court. Given this forum shopping scenario, the New Jersey court's preclusion of Giudice's wrongful discharge claim is understandable. It does not, however, indicate whether New Jersey would have barred the claim if the New York court could not have exercised jurisdiction over it.

Notwithstanding the apparent breadth of the New Jersey entire controversy doctrine, we are not at liberty to use the availability of the analogous state law claim to preclude the federal claim here. The Supreme Court in *Marrese* noted that in states that have a res judicata jurisdictional requirement, an earlier action "based on a state statute analogous to a federal statute, e.g., a state antitrust law, does not bar subsequent attempts to secure relief in federal court if the state court lacked jurisdiction over the federal statutory claim." 470 U.S. at 383 n. 3, 105 S.Ct. at 1333 n. 3. Although New Jersey unquestionably applies broad claim preclusion, several factors indicate that it nevertheless requires that any precluded claim be within the jurisdiction of the first court: (1) the reliance of New Jersey courts on the Restatement (Second) of Judgments; (2) the language and application of the New Jersey entire controversy doctrine; and (3) the historic application of

res judicata to claims prior to the merger of law and equity. We consider these factors in turn.

First, although we have found no instance in which a New Jersey court has adopted § 26(1)(c), the provision setting forth the jurisdictional requirement, New Jersey courts have relied on the Restatement (Second) of Judgments generally in determining the preclusive effect to be given to claims under the entire controversy doctrine. *See, e.g., Brown v. Brown,* 208 N.J.Super. 372, 506 A.2d 29 (App.Div.1986). In *Brown,* although the court did not have the opportunity to consider whether prior jurisdictional competency is a requirement of preclusion, the court indicated its approval of the jurisdictional requirement by quoting the entire § 26(1), including subsection (c), in a footnote.[16] 506 A.2d at 35 n. 2.

Second, the tenor of the New Jersey courts' approach to claim preclusion indicates that the entire controversy doctrine includes a jurisdictional requirement. For example, in *Bates Marketing Associates, Inc. v. Lloyd's Electronics, Inc.,* 190 N.J. Super. 502, 464 A.2d 1142, 1144 (App.Div. 1983), *appeal dismissed,* 97 N.J. 703, 483 A.2d 211 (1984), the court stated that preclusion applies to claims "which were not but should have been raised in the initial litigation." Although this formulation is somewhat tautological, presumably a claim over which the earlier court lacked jurisdiction is not one which should have been raised. Thus, New Jersey courts have declared that only those claims that "could have been raised" are excluded. *Gottdiener v. Roxbury Township,* 2 N.J.Tax 206 (1981) (citing *Bowers v. American Bridge Co.,* 43 N.J.Super.

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16. Section 26(1)(c) states that a claim is not extinguished when:

The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

48, 127 A.2d 580 (App.Div. 1956), *aff'd*, 24 N.J. 390, 132 A.2d 28 (1957) (applying Pennsylvania law)).[17]

Third, at its inception, the entire controversy doctrine included a jurisdictional requirement. Prior to the passage of the Judicial Article of the New Jersey Constitution of 1947, the courts of the state were divided between equity and law, a situation which presents an opportunity to determine whether the state would have given, albeit many years ago, preclusive effect to claims that could not have been tried in a court with limited (law or equity) jurisdiction. In *Ajamian v. Schlanger*, 14 N.J. 483, 103 A.2d 9, 11, *cert. denied*, 348 U.S. 835, 75 S.Ct. 58, 99 L.Ed. 659 (1954), then-New Jersey Supreme Court Justice Brennan noted that a prior action in an equity court in New Jersey

> would probably not have barred the subsequent action at law . . . because the former Court of Chancery had no jurisdiction to entertain a claim for the purely legal remedy and it was rightly considered to be inordinately harsh and unjust to conclude a complainant, denied the opportunity in the Chancery action, from seeking the only remedy . . . in fact available to him.

Id. 103 A.2d at 11 (citations omitted). Although *Ajamian* is distinguishable because, before the merger of law and equity, the legal and equitable claims could not have been tried together in either court, the case nevertheless indicates that when confronted by the question of the limited jurisdiction of courts of equity and law, the New Jersey courts have declined to apply claim preclusion.

It is also important to note that New Jersey courts, in cases where a claim was first brought in federal court, have

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17. Although distinguishable from the case *sub judice* because it applied to an issue actually litigated in another court, in *Roberts v. Goldner*, 79 N.J. 82, 397 A.2d 1090 (1979), the New Jersey Supreme Court adverted to the *res judicata* jurisdictional requirement. The court stated that "[a] cause of action once finally determined between parties on the merits *by a tribunal having jurisdiction* cannot be relitigated by those parties . . . in a new proceeding." *Id.* 397 A.2d at 1091 (emphasis added) (citations omitted).

precluded state claims arising out of the same controversy, but only after a careful determination that the federal court had subject matter jurisdiction over the state claims. For example, in assessing whether the entire controversy doctrine barred the assertion of a state claim after a federal district court's dismissal of related claims, the Appellate Division in *Blazer Corp. v. New Jersey Sports & Exposition Authority,* 199 N.J.Super. 107, 488 A.2d 1025, 1028 (App.Div.1985), stated that "[t]he single controversy doctrine is available to bar plaintiffs' claims . . . only if the federal court had the 'power' to exercise pendent jurisdiction over those claims." Because it determined that the federal court did have subject matter jurisdiction over the claims raised in the subsequent state claim, the court precluded the state claims. Thus, the court premised its application of claim preclusion on existence of subject matter jurisdiction in the first forum. *See also Ferger v. Local 483,* 94 N.J.Super. 554, 229 A.2d 532, 541 (Ch.Div.) (where federal court declined to exercise pendent jurisdiction over state claim arising from the same controversy, state claim not precluded in subsequent state action), *aff'd per curiam,* 97 N.J.Super. 505, 235 A.2d 482 (App.Div. 1967), *certif. denied,* 51 N.J. 181, 238 A.2d 468 (1968).[18]

[11] To summarize, *Marrese* sets up a two-part inquiry. The first part concerns whether the factual nexus of the antitrust claim is sufficiently related to the claims tried in state court that New Jersey's entire controversy doctrine

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18. We note that the application of res judicata to cases in which the first tribunal was a state court of limited jurisdiction and the second was a state court of general jurisdiction does not advance the analysis. Although the cases indicate that New Jersey does not preclude claims following prior decisions of such courts, the rationales offered therein for denying preclusion rest only in part on the inability to bring certain claims in the court of limited jurisdiction. *See, e.g., East Hanover Township v. Cuva,* 156 N.J.Super. 159, 383 A.2d 725, 727 (App.Div. 1978) (no preclusive effect given to an earlier decision by a court of limited jurisdiction where: (1) the court of limited jurisdiction applied a different standard of proof; (2) the losing party was unable to appeal from the first judgment; and (3) "the nature of the remedy available in the second suit in vindication of a public interest [was] more expansive than that in the first suit").

would apply. Because we conclude that the second part is not met, however, we do not reach this question. We conclude that the second part is not met because we determine that New Jersey courts, if faced with the question, would follow Restatement (Second) of Judgments approach and would decline to preclude a claim over which the initial court lacked jurisdiction. Our conclusion that Nanavati's antitrust claims are not precluded requires us to address his contention that the district court erred in granting judgment n.o.v. as to those claims.

VI. THE ANTITRUST CLAIMS

A. *Procedural History; Problems and Contentions*

Nanavati's initial antitrust claim, which was included in his counterclaim to Sorensen's defamation action, was asserted against Sorensen alone. The counterclaim asserted that, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, Sorensen: (1) caused the revocation of Nanavati's hospital staff privileges; and (2) organized a doctors' boycott of patient referrals at the Hospital. The claim was premised on Sorensen's putative desire to exclude Nanavati because of his competitive threat to Sorensen's lucrative cardiological practice. As we have noted above, at the close of Nanavati's case he moved to amend the complaint and pretrial order to add the Hospital and the Executive Committee as defendants.[19]

The district court submitted the antitrust claim to the jury on rule of reason and *per se* grounds. The court instructed the jury that if it found that a group boycott existed and was motivated "in whole or in part by the legitimate concerns for quality of patient care, such as lack of professional competence, unprofessional behavior and the like" the conduct was to be judged (under the rule of reason) by examining the defendants' actions to determine whether the boycott was an unreasonable restraint of trade. J.A. at 4403. The

19. Because we will affirm the district court's grant of judgment n.o.v. for the Hospital and Executive Committee, however, we need not address the propriety of adding them as defendants.

court also instructed the jury that if it found a group boycott without such motivation it should find that the conduct was *per se* unreasonable.

The jury returned a special verdict as follows:

B1. Was there a contract, combination, or conspiracy in restraint of interstate commerce?

Yes X No___

* * *

B2. Was the Hospital part of the contract, combination, or conspiracy?

Yes X No___

B3. Was the Executive Committee part of the contract, combination, or conspiracy?

Yes X No___

B4. Was Dr. Sorensen part of the contract, combination, or conspiracy?

Yes___ No X

* * *

B5. Did any of the participants perform any act in furtherance of the contract, combination, or conspiracy?

Yes X No___

* * *

B6. Did the contract, combination, or conspiracy take the form of a group boycott?

Yes X No___

* * *

B7. Was Dr. Nanavati boycotted because of unprofessional behavior or violations of public service or other ethical norms?

Yes X No___

* * *

B8. Did the contract, combination, or conspiracy constitute an unreasonable restraint on interstate commerce?

Yes X No___

B9. Did the contract, combination, or conspiracy injure Dr. Nanavati in his business or property?

Yes X No___

* * *

B10. Did Dr. Nanavati first sustain injury before June 5, 1980?

Yes___ No X

B11. What is the amount of damages which Dr. Nanavati sustained because of the contract, combination, or conspiracy?

$350,000

645 F.Supp. at 1237-39.

The verdict is confusing at best. Despite Nanavati's attempt to prove that Sorensen was the ringleader in one overarching antitrust conspiracy—indeed that was the central theme of his trial strategy--the jury exonerated Sorensen. However, it found that the Executive Committee and the Hospital, who were added as defendants after the close of Nanavati's case-in-chief, had engaged in a combination or conspiracy that took the form of a group boycott of Nanavati's services. The jury found the Hospital and Executive Committee liable despite rejecting Nanavati's auxiliary theme: that the exclusion of Nanavati from the Hospital was motivated solely by anticompetitive intent. Rather, the jury found that these defendants had participated in the boycott because they believed Nanavati had participated in "unprofessional behavior or violations of public service or other ethical norms." 645 F.Supp. at 1239. However, despite its finding of the defendants' (legitimate) motivations, the jury found the combination or conspiracy an unreasonable restraint on interstate commerce and returned a verdict in favor of Nanavati and against the Hospital and Executive Committee in the sum of $350,000, which, when trebled in accordance with 15 U.S.C. § 15(a), increased to $1,050,000.

At the threshold level of analysis, the exoneration of Sorensen and the finding that the Executive Committee and the Hospital acted out of at least some legitimate motivations

leave the foundations for liability extremely vague. First, because the district court instructed the jury that the Hospital could not conspire with the Executive Committee, its agent, it is unclear who were the parties to the conspiracy. No interrogatory regarding other possible conspirators was submitted to the jury, and therefore there is no basis for a conclusion as to who, if anyone, the Hospital's co-conspirators were.[20] Second, the very basis of liability is vague. The jury found that the conspiracy had imposed an unreasonable restraint on commerce with anticompetitive effects, despite its finding of defendants' good intentions. But we do not know whether the jury believed that the defendants' opinion of Nanavati simply was mistaken or whether it believed that the boycott was an unreasonable restraint of trade even if Nanavati had engaged in unprofessional conduct or violations of accepted professional norms. We also do not know which of the two alleged restraints (revocation of staff privileges or boycott of referrals) actually existed in the jury's view, and which of them the jury believed to be unreasonable.

The district court granted judgment n.o.v. for the Hospital and Executive Committee because it concluded that the record was "devoid of evidence to support a finding that either the Hospital or the Executive Committee participated in any conspiracy designed to stifle competition or engaged in any unlawful restraint of trade that had an anti-competitive effect." 645 F.Supp. at 1229. The parties now renew their arguments over the district court's reasoning, and the Hospital and Executive Committee attempt to raise additional grounds for setting aside the jury's verdict.[21]

Nanavati maintains that the district court erred in con-

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20. The district court noted that the parties decided not to request a special finding seeking that the jury determine whether non-defendants participated in the alleged conspiracy. 645 F.Supp. at 1229 n. 20.

21. We note that defendants have not raised, and we do not here address, the question whether the Hospital's peer review actions were immune under the doctrine of *Parker v. Brown*, 317 U.S. 341, 350-51, 63 S.Ct. 307 313-14, 87 L.Ed. 315 (1943). *See Patrick v. Burget*, ___ U.S. ___, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

cluding that the record lacked evidence to support the jury's finding of liability against the Executive Committee and Hospital. He first contends that, under *Weiss v. York Hospital,* 745 F.2d 786 (3d Cir.1984), *cert. denied,* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985), as a matter of law, the Executive Committee comprised a combination in regard to the revocation of his staff privileges and boycott of referrals. He also contends that the Hospital's contract with Komansky for cardiological testing constituted a contract in restraint of trade. Perhaps recognizing that the Hospital's involvement in the Komansky contract does not constitute a contract, combination or conspiracy relating to the two matters submitted to the jury—the staff privileges revocation and the alleged boycott of referrals—Nanavati contends that the Hospital is liable to the extent it acted to further the Committee's unlawful combination and for the acts of individual physicians on its staff. Moreover, implicitly conceding that the case does not implicate a *per se* violation of the antitrust laws, Nanavati contends that the Committee's actions constituted an unreasonable restraint of trade because they had an anticompetitive purpose and effect.

The Hospital and Executive Committee contend that Nanavati failed at trial to: (1) identify the participants in the alleged conspiracy; (2) properly define the relevant product and geographic market or prove anticompetitive effect within that market; and (3) prove anticompetitive motivation on the part of either the Hospital or Executive Committee, and that these failures are fatal to his case.[22]

[12] Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

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22. Our review of the district court's judgment n.o.v. is plenary. We must "determine, as a matter of law, whether the record contains the 'minimum quantum of evidence from which a jury might reasonably afford relief.' " *Smollett v. Skayting Dev. Corp.,* 793 F.2d 547, 548 (3d Cir.1986) (quoting *Dennery v. Siegel,* 407 F.2d 433, 439 (3d Cir.1969)).

> among the several States, or with foreign nations, is declared to be illegal . . .

Under settled law, the jury must find three elements to prove a violation of the Act: (1) a contract, combination or conspiracy; (2) in restraint of trade; and (3) an effect on interstate commerce. The effect on interstate commerce is not at issue.

B. *Contract, Combination or Conspiracy*

1. Introduction: Summary Disposition of Certain Issues

The jury found that both the Hospital and the Executive Committee participated in a combination or conspiracy, regarding either the revocation of Nanavati's staff privileges or the subsequent boycott of referrals (Nanavati's two theories of antitrust violation). Ruling upon the Hospital's and Executive Committee's motion for judgment n.o.v., the district court, following our opinion in *Weiss*, 745 F.2d at 816, concluded that the Executive Committee, having issued a recommendation that Nanavati's staff privileges be terminated, comprised a "combination" for antitrust purposes. However, the court absolved the Hospital of liability arising from the staff privileges revocation on the grounds that, under *Weiss*, the Hospital could not legally conspire with its staff and that no other potential conspirator was available.

[13] It was settled by *Weiss* that, when the Executive Committee acts as a body, it constitutes a "combination." In *Weiss*, looking to the economic substance of the staff arrangement, we determined that each medical staff member has an independent economic interest separate from each other member's interest and thus that the medical staff cannot be considered a single economic entity. 745 F.2d at 815. We held "that, as a matter of law, the medical staff is a combination of individual doctors and therefore that any action taken by the medical staff satisfies the 'contract, combination or conspiracy' requirement of section 1." *Id.* at 814. Because the Executive Committee members, as members of the medical staff, are independent actors comparable to the members of the medical staff in *Weiss*, we agree with the district court that

the Executive Committee is similarly a combination, at least with regard to the Committee's recommendation regarding the revocation of Nanavati's staff privileges. *See infra* page 118 (discussing the boycott of referrals).

[14] Nor need we dwell upon the question whether Nanavati satisfied the contract, combination or conspiracy requirement as it bears upon the Hospital's alleged participation in a conspiracy to revoke Nanavati's staff privileges. In *Weiss*, we concluded that a hospital could *not* conspire with its medical staff, as an entity, because the staff "operated as an officer of a corporation would in relation to the corporation . . . [and] had no interest in competition with the hospital." 745 F.2d at 817. We therefore conclude that the district court correctly held that the Hospital could not conspire with the Executive Committee.

[15] Nanavati maintains, however, that *individual doctors'* actions regarding the boycott of referrals should be sufficient to envelop the Hospital in a conspiracy since the emergency room, where discussions regarding the boycott allegedly took place, was operated under contract with the Hospital. In *Weiss*, we did not reach the question whether individual members of a medical staff, operating under contract to a hospital, could ever conspire with the hospital. Although the physicians in the Hospital's emergency room here were not acting as officers of the corporation, they, like the doctors in *Weiss*, had no interest in competition with the Hospital. The doctors stood to gain or lose from the successful operation of the emergency room as did the Hospital itself. Moreover, Nanavati presented no evidence linking the alleged boycott of referrals to the Hospital's involvement in the revocation decision. We therefore conclude that evidence of emergency room doctors' alleged conspiratorial acts, even if they had related to the revocation decision, would not support a finding that the Hospital was a conspirator.

Turning to the Executive Committee and focusing solely on the alleged boycott of referrals, because there is no contention that the Executive Committee itself took any action in furtherance of the boycott, we must consider whether the

Executive Committee *qua* Committee is a combination for this purpose, and we must also address the question whether there is any evidence that the members of the Committee participated in a conspiracy. We turn now to these questions.

2. Boycott of Referrals by the Executive Committee or Its Members

Nanavati theorized that Sorensen led a group boycott of patient referrals. The district court rejected liability for the alleged boycott on the ground that Nanavati had proven no link between the doctors who allegedly declined to refer patients (who were not named as individual defendants) and either the Hospital or the Executive Committee. We will therefore consider whether the Executive Committee could comprise a combination in regard to the boycott of referrals and, if not, whether there is any evidence implicating individual members of the Committee in a conspiracy.

Nanavati maintains that because the actions of the Executive Committee are the actions of a combination under *Weiss,* the Committee must be a combination in regard to the boycott of referrals. However, Nanavati's argument fundamentally misconstrues our holding in *Weiss,* where the medical staff of York Hospital, like the Executive Committee, had the authority under the hospital's corporate charter to make staff privilege recommendations. In *Weiss,* because members of the medical staff were independent economic actors, we held that any action taken by the medical staff satisfied the "contract, combination or conspiracy" requirement of section 1. Thus, we held that when the medical staff acted, it comprised a combination and "the absence of evidence of any other co-conspirator(s) is irrelevant." 745 F.2d at 814.

It does not follow, however, that where, as here, the Executive Committee is not alleged to have acted as an entity in furtherance of the conspiracy, it should be considered a combination. Our conclusion in *Weiss* was premised on the concept that where individual actors take actions as a group, they are a combination for the purposes of those actions. Where no group action is taken, no such combination can

exist. In short, we did not hold in *Weiss* that because the actions of the medical staff constitute the actions of a combination, even where there is no allegation that the staff acted as a group, the "contract, combination or conspiracy" requirement has been met. Such a group is a combination as a matter of law only for the actions it takes as a group.

[16] Here, Nanavati does not maintain that the Committee took any group action. Thus, unlike *Weiss,* for the purposes of the boycott of referrals, we conclude that the Executive Committee does not constitute a combination as a matter of law. Instead of group action by the Executive Committee, Nanavati points to the actions and motivations of medical staff members who were not on the Committee. Nanavati maintains that because there is evidence of a boycott by members of the medical staff, the district court erred in finding no evidence that the Executive Committee participated in a conspiracy to boycott Nanavati. Nanavati's conclusion does not follow, however, because he has not shown that any members of the Executive Committee—none of whom were cardiologists—committed any acts in furtherance of the referrals boycott.

We therefore must consider whether Nanavati introduced sufficient evidence from which the jury could have inferred that Executive Committee members were conspirators in the boycott of referrals. In *Monsanto Co. vs. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), the Supreme Court determined the standard for when sufficient evidence exists to permit the inference of an antitrust conspiracy:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action. .... That is, there must be direct or circumstantial evidence that reasonably tends to prove .... a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 768, 104 S.Ct. at 1473. In *Tunis Brothers Co. v. Ford Motor Co.,* 763 F.2d 1482, 1491 (3d Cir.1985), *vacated and*

remanded, 475 U.S. 1105, 106 S.Ct. 1509, 89 L.Ed.2d 909 (1986), *reinstated*, 823 F.2d 49 (1987), *cert. denied*,—U.S.—, 108 S.Ct. 1013, 98 L.Ed.2d 979 (1988), we held that "[t]hose who, with knowledge of the conspiracy, aid or assist in carrying out the purposes of the conspiracy make themselves parties thereto and are equally liable to or guilty with the original conspirators." (footnote omitted). However, Nanavati has presented neither evidence from which the jury could infer that the Executive Committee actually participated in the conspiracy nor acts that aided or assisted the alleged boycott of patient referrals.

Nanavati has pointed to the testimony of a Dr. Splitter that several doctors agreed "on the Hospital floor and at a restaurant meeting of the Staff, to take actions against 'the Indian.'" Nanavati Br. at 16 (quoting J.A. at 4071). For us to reverse the district court's determination, we must find some evidence in the record from which the jury could have concluded that these doctors conspired with either the Hospital or the Executive Committee to boycott referrals of patients to Nanavati. Of course, the mere fact that the "agreement" took place in the Hospital does not implicate the Hospital itself in the conspiracy. Nanavati does not maintain that the Hospital took official action in furtherance of the boycott. Moreover, Splitter's testimony does not indicate Executive Committee involvement.

First, an examination of Splitter's testimony reveals that the "agreement" at the Hospital consisted of "a remark about Indian doctors, that the Indian doctors are overrunning us and we have to stop it," J.A. at 4071, and that it was made by Sorensen, who was exonerated by the jury. At trial, Splitter could not recall who heard the remark, much less that any members of the Executive Committee agreed to act on it. Second, Splitter's testimony indicates that the "meeting" that took place at a local restaurant was a staff party, and that the doctors involved included Sorensen, a Dr. Napoleon, Dr. Joseph Furey, and "many others." J.A. at 4072. Nanavati does not maintain, and the record contains no evidence that would lead us to the conclusion, that any of these individuals were

members of the Executive Committee or that there was any other Committee or Hospital involvement in these discussions. *See* 6 P. Areeda, *Antitrust Law* ¶ 1417B, at 98 (1986) ("Mere conspiratorial opportunity is routinely and correctly held insufficient to support a conspiracy finding." (footnote omitted)). Moreover, to the extent Nanavati sought to demonstrate that the Executive Committee members interacted with the allegedly boycotting doctors, we note that, as the Court of Appeals for the District of Columbia Circuit held in *Kreuzer v. American Academy of Periodontology,* 735 F.2d 1479, 1488 (D.C.Cir.1984), "[t]he mere showing of frequent relations between alleged conspirators .... is insufficient to infer an illegal agreement." (citations omitted).

Nanavati next maintains that there was evidence that emergency room physicians were instructed to keep referrals "in the family" and thus to boycott him. J.A. at 4076. The testimony of Dr. DiRago indicated that the "in the family" statement was made by Dr. Sorensen, however, and did not implicate any Executive Committee members. In response to a question from counsel about whether the statement reflected a policy of the Hospital, DiRago responded that "there is no general policy." J.A. at 4077. Thus, these statements provide no support for the assertion that either the Hospital or the Executive Committee conspired with doctors who allegedly were boycotting Nanavati.

Nanavati also relies on statements by Dr. Napoleon that "we have to fight" foreign doctors coming into the area, J.A. at 4335, and that "[w]e will bring in an American cardiologist" after removing Nanavati. J.A. at 4336. Dr. Napoleon was not a member of the Executive Committee, however.

Finally, Nanavati maintains that, "[t]o the extent the Hospital acted to further the Committee's unlawful combination, the Hospital is as liable as the Committee." Nanavati Br. at 16. However, because we conclude that the district court correctly determined that the record contains no evidence of involvement by the Committee or its members in the boycott of referrals, we need not reach the question whether the Hospital may be held liable for the Committee's actions. We therefore conclude that the district court correctly deter-

mined that the evidence does not support a verdict against either the Hospital or the Executive Committee based on the boycott of referrals.[23]

3. Conclusion

In sum, we conclude that Nanavati failed to present a case that the Hospital participated in a combination or conspiracy with respect to either its staff privileges revocation or in the subsequent boycott of patient referrals. We therefore will affirm the district court's grant of judgment n.o.v. for the Hospital. Although the evidence is similarly lacking as to the Executive Committee's participation in the alleged conspiracy to boycott patient referrals, because the Executive Committee is a combination for the purposes of the revocation of Nanavati's staff privileges, we turn next to whether the district court properly granted judgment n.o.v. for the Committee on that claim, a consideration that turns on the sufficiency of damages.

C. *Evidence of Damages*

[17] Our conspiracy analysis leaves one remaining claim at issue: whether the Executive Committee's recommendation that Nanavati's staff privileges be revoked comprised a restraint of trade in violation of § 1 of the Sherman Act. The defendants have, with great force, asserted a number of substantive antitrust arguments as to why Nanavati did not make out such an antitrust claim.[24] However, we need not address

23. Nanavati also maintains that an exclusive contract with Dr. Henry Komansky for the provision of stress and echocardiogram tests is sufficient to implicate the Hospital in a conspiracy to exclude him, but Nanavati does not indicate how the Komansky contract would demonstrate the Hospital's involvement in either of the two anticompetitive acts sought to be proved at trial—the staff privileges revocation or the boycott of referrals.

24. In light of the jury's finding that he was excluded because of his unprofessional behavior, Nanavati does not contend that the defendant's conduct would support a finding of *per se* liability. But even under rule of reason analysis Nanavati's case is fraught with problems, especially considering a hospital's need to control the quality of its staff and to ensure that adequate patient care is provided. *See Weiss*, 745 F.2d at 821 n. 60.

As to anti-competitive motivation, the jury made a supported finding

that Nanavati was boycotted "because of unprofessional behavior or violations of public service or other ethical norms," 645 F.Supp. at 1239, hence Nanavati cannot dispute that he was boycotted, at least in part, because of his unprofessional behavior. Because Sorenson was exculpated by the jury and no members of the Executive Committee were cardiologists, Nanavati has presented no rational theory of the economic gain that the Executive Committee stood to receive, or of concomitant harm to competition, from the revocation of Nanavati's staff privileges. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 280, 88 S.Ct. 1575, 1588, 20 L.Ed.2d 569 (1968)) (where plaintiffs are unable to assert viable economic theory supplying a "rational motive to join the alleged boycott," simple refusal to deal cannot support a finding of antitrust liability). Moreover, as the district court concluded, nothing in the record supported an assertion that the staff privileges revocation was based on an actual desire "for personal economic gain," or that even "the existence of a *potential* for economic gain by the Executive Committee members" was present. 645 F.Supp. at 1231 N. 28 (emphasis in original). Furthermore, the statement of a Dr. Napoleon that "we have to fight [foreign doctors], because now there will be so many doctors around the area and what happens to us[?]," J.A. at 4335-36, cannot be evidence of anticompetitive animus by the Committee because Dr. Napoleon was never a member of the Executive Committee.

As to anti-competitive effect, Nanavati's failure to present evidence of damages, as discussed in the text *infra*, parallels the failure here. The district court concluded that although the Executive Committee's action would have diminished Nanavati's ability to treat patients, nothing in the record indicated that the action "substantially impaired competition." J.A. at 1231. On appeal, Nanavati contends that "[t]here can be little doubt of the anticompetitive effect," Nanavati Reply Br. at 16, and refers us to an earlier argument that "[o]uster of [him] from the Staff . . . would result in only one cardiologist being available to the patients most in need of such specialty service, those requiring hospitalization." *Id.* at 12. Although revocation unquestionably affected Nanavati, our review focuses on the effect on competition in the relevant market. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 297-98, 105 S.Ct. 2613, 2621-22, 86 L.Ed.2d 202 (1985).

But the impact on the supply of cardiological services was necessarily limited because Nanavati's absence lasted for only five days and the effect of the revocation was limited to Nanavati's ability to practice in the Hospital. As we note *infra*, Nanavati performed stress and echocardiogram tests in his office. Even though the temporary deprivation of staff privileges might have had an effect, it was incumbent upon Nanavati to put on at least *some* evidence of the impact of the exclusion on the market so that the jury, and

these arguments because we note that Nanavati has simply failed to prove any damages from the revocation.[25]

Because the state court enjoined the revocation, Nanavati's absence lasted for only five days. Not only did the revocation last for a short period, but its effect was limited to Nanavati's ability to practice in the Hospital, and, *a fortiori*, did not restrict his lucrative office practice. The record is clear that even sophisticated tests such as stress tests and echocardiograms were performed by Nanavati in his own office; hence we must review the revocation in terms of its impact on Nanavati's ability to provide cardiological services that require hospitalization. But this point was never quantified on the record. Moreover, a review of the record reveals no evidence from which the jury could have concluded that Nanavati lost patients or EKG readings during the five day revocation period. We also note that Nanavati's practice has, in fact, increased from 1,200 patients at the time he initially filed his complaint, to 4,000 at the time of trial; hence the jury could not have simply inferred that Nanavati suffered long term damages from the five day revocation. On these facts, we find no basis for a jury verdict in Nanavati's favor based solely on the Executive Committee's revocation of Nanavati's staff privileges.

D. *Summary*

In sum, because the Hospital could not conspire with either the Executive Committee or individual members of its staff, we conclude that the Hospital cannot be liable for its revocation of Nanavati's staff privileges or for the alleged boycott of patient referrals. Similarly, because the Executive Committee did not act as a body in regard to the boycott of

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this court on appeal, would not be forced to speculate as to what the injury might have been. However, he did not. Finally, not only was the impact on the supply of cardiological services limited, but there was no evidence that Nanavati's revocation had an effect on the cost of cardiological services. Although not required in all cases, evidence of higher prices is a relevant consideration, particularly in the absence of other indicia of economic effect.

25. Nanavati also has sought to rely on an exclusive contract between

referrals, it did not comprise a combination as a matter of law, and because there is no evidence in the record that its members participated in the boycott, the Committee cannot be liable under that theory.

The Executive Committee does comprise a combination insofar as it recommended that the Hospital terminate Nanavati's staff privileges. However, absent some evidence of damages resulting from the Executive Committee's revocation recommendation, we are unable to conclude that the district court's judgment n.o.v. for the Executive Committee was in error. We therefore will affirm the grant of judgment n.o.v. for both the Hospital and the Executive Committee.

VII: CONCLUSION

For the foregoing reasons, we will: (1) affirm the district court's denial of the new trial motion on Nanavati's § 1981 claim; (2) affirm the judgment n.o.v. on Nanavati's antitrust claims; (3) affirm the district court's determination that it had subject matter jurisdiction over the state law defamation and tortious interference with business claims but reverse the judgment for Sorensen on both claims; and (4) dismiss the cross appeal of the Hospital, Executive Committee and Sorensen.

Ironically, despite years of vexatious litigation, the parties will be where they were before the suit began. "Durum valde durum, sed sic lex est." *Penhallow v. Doane's Administrators*, 3 U.S. (Dall.) 54, 88–89, 1. L.Ed. 507, 521–22 (1795) ("Hard very hard, but such is the law").

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the Hospital and Dr. Komansky for the provision of stress tests and echocardiograms. However, Nanavati did not advance in his complaint, in his pretrial memorandum, or on appeal that the exclusive contract with Komansky itself comprised an illegal practice, (presumably either an exclusive dealing or a tying arrangement) and has not linked the contract to the sole remaining defendant, the Executive Committee.

Suketu H. NANAVATI, M.D., Plaintiff,

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL; Executive Committee of the Medical Staff of Burdette Tomlin Memorial Hospital and Robert J. Sorenson, M.D., Defendants.

Robert J. SORENSON, M.D., Plaintiff,

v.

Suketu H. NANAVATI, M.D., Defendant.

Civ. A. Nos. 83-0794, 84-1790.

United States District Court, D. New Jersey.

Oct. 2, 1986.

Schwartz & Fioretti by Stacey L. Schwartz, Cherry Hill, N.J. and Kohn, Savett, Klein & Graf, P.C. by David H. Weinstein, William B. Lytton, Philadelphia, Pa., for Suketu H. Nanavati, M.D.

Horn, Kaplan, Goldberg, Gorny & Daniels by Robert E. Paarz, William M. Honan, Atlantic City, N.J., for Burdette Tomlin Memorial Hosp., The Executive Committee of the Medical Staff, and Robert J. Sorenson, M.D.

Valore, McAllister, Westmoreland, Gould, Vesper & Schwartz by Carl J. Valore, Nina Chase, Northfield, N.J. for Burdette Tomlin Memorial Hosp.

Brad J. Spiller, Camden, N.J. and F. Emmett Fitzpatrick, P.C. by F. Emmett Fitzpatrick, Jr., F. Emmett Fitzpatrick, III, Philadelphia, Pa., for Robert H. Sorenson, M.D.

Rubins, Waldron & Barry by James A. Waldron, Wild-

wood, N.J., for Executive Committee of the Medical Staff of Burdette Tomlin Memorial Hosp.

COHEN, Senior District Judge:

This complex, multi-issue case, which included claims and counterclaims among Dr. Suketu H. Nanavati, Dr. Robert J. Sorenson, the Burdette Tomlin Memorial Hospital ("BTMH" or "the Hospital")[1] and the Executive Committee of the Hospital's Medical Staff ("the Executive Committee")[2] was tried before a jury for nine weeks. Sixty-five witnesses were presented, nine lawyers and their staffs participated in the case, and eleven separate opinions, 4 before trial and 7 during trial, were filed by this Court. Forty-five special interrogatories were submitted to the jury. The jurors deliberated for 4 days, and, during this time, communicated with the Court on 8 occasions.

Presently before the court are post-trial motions by plaintiff/counterclaim—defendant, Dr. Nanavati, defendant/counterclaim—plaintiff, Burdette Tomlin Memorial Hospital, and defendant, the Executive Committee. Dr. Nanavati moves for a judgment notwithstanding the verdict ("j.n.o.v.") pursuant to Fed.R.Civ.P. 50(b), and, in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59(a). BTMH and the Executive Committee also move herein for j.n.o.v. and, alternatively, for a new trial.[3]

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1. Burdette Tomlin is a small non-teaching community hospital. It had 171 beds in 1979, and 239 beds as of January 1984. It is located in Cape May Courthouse, New Jersey, and is the only hospital in Cape May County.

2. Two separate cases, Civil Action Nos. 83–0794 and 84–1790 were consolidated for trial by this court. Dr. Nanavati is the plaintiff in Civil Action No. 83-0794 and the defendant-counterclaimant-plaintiff in Civil Action No. 84-1790. Dr. Sorenson is the plaintiff in Civil Action No. 84–1790 and the defendant-counterclaimant-plaintiff in Civil Action No. 83–0794. The Hospital and the Executive Committee are the defendants-counterclaimants-plaintiffs in Civil Action No. 83–0794.

3. BTMH and the Executive Committee, by motion filed July 25, 1986, request this Court to "mold" the antitrust verdict. Since, however, judgment was entered on the jury's verdict on July 23, 1986, two days prior to the filing of this motion, said motion shall be denied as moot.

I. BACKGROUND

The factual predicate for this case is somewhat difficult to summarize, as it consists of events taking place over a number of years. Without purporting to illuminate every nuance of the matter, we shall set forth a brief account of the facts.

Dr. Nanavati, who speaks English with an Indian accent, is a dark-skinned native of Ahmedabad, India. He was educated in India and, in 1970, came to this country to continue his medical education. He was eventually naturalized as a United States citizen, and was Board Certified in Cardiology in 1977. Thereafter, he served as Chief of Cardiology in a hospital at Debois, Pennsylvania, for about a year and a half, at which time he sought to move his practice to New Jersey. In March of 1979 Dr. Nanavati began working at BTMH, having gained admission to the medical staff without difficulty. Prior to his admission and shortly after his arrival at BTMH, Dr. Nanavati discussed the opportunities for reading Electrocardiograms (EKG's)—a privilege which earns the reading physician $5.00 for each EKG—with the Chief of Cardiology at BTMH, Dr. Robert Sorenson. Dr. Sorenson, who is Board Certified in Internal Medicine, but not in the subspecialty of Cardiology, had exclusive control over allocating these reading privileges.

Approximately three weeks after his arrival at BTMH, Dr. Nanavati, having encountered resistance to his attempts to share immediately in the reading of EKGs sought assistance in attaining the privilege from the Executive Committee of the Medical Staff. A few days later, evidently angered upon being told that he must await Dr. Sorenson's decision regarding the date he could expect to begin reading EKGs, Dr. Nanavati verbally inquired, at a meeting of the entire medical staff, why an "inferiorly qualified" physician controlled the EKG readings. Trial transcript of June 2, 1986 at pp. 81-84.[4]

4. To be noted is that Dr. Nanavati was, some time thereafter, at the urging of the Executive Committee, granted one day's reading of EKG's and at present has 3 days readings, as much as anyone else.

Thus was fired the opening shot of an economic battle—a competitive fight—between these two doctors for the control of medical care of cardiac patients in Cape May County.

Subsequent to this incident, with the apparent achievement of a complete alienation of Dr. Sorenson, Dr. Nanavati proceeded to challenge a variety of matters concerning hospital practices and patient care within Cape May County. These challenges included public accusations that Dr. Sorenson was incorrectly interpreting EKGs, quarrels with nursing personnel, and confrontations with members of BTMH's Medical Staff. Eventually, purportedly because the Hospital determined that he was disruptive, overly aggressive, and incapable of working harmoniously with others, attempts were made to revoke Dr. Nanavati's staff privileges. A brief litany of some of the key occurrences follows.

In June of 1982, Dr. Nanavati filed a charge against BTMH with the Equal Employment Opportunity Commission ("EEOC") alleging national origin discrimination. In August of 1982, charges were filed with the Executive Committee seeking Dr. Nanavati's termination from the medical staff. On September 9, 1982, Dr. Nanavati filed a second charge against BTMH with the EEOC alleging unlawful retaliation. On November 12, 1982, Dr. Nanavati's staff privileges at BTMH were deemed terminated. Five days later, on November 17, 1982, pursuant to a complaint filed in the Chancery Division of the Superior Court of New Jersey, a temporary restraining order was issued which reinstated Dr. Nanavati to the BTMH staff. On March 8, 1983, Dr. Nanavati filed his complaint in the instant case. On March 17, 1985, pursuant to its holding, on January 14, 1985, that the Hospital and the Executive Committee violated the medical staff bylaws by the manner in which they handled the disposition of the charges against Dr. Nanavati, the Chancery Division of the New Jersey Superior Court entered a judgment permanently enjoining BTMH and the Executive Committee from attempting to terminate Dr. Nanavati's staff privileges based upon the earlier charges.[5]

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5. The Chancery Division's finding that Dr. Nanavati had not been ac-

The legal claims advanced by the parties in the present case included a claim by Dr. Nanavati against the Hospital and the Executive Committee for an alleged violation of the 1870 Civil Rights Act, 42 U.S.C. § 1981;[6] a claim by Dr. Nanavati against the Hospital, the Executive Committee and Dr. Sorenson pursuant to the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, and the New Jersey Antitrust Act, N.J.S.A. 56:9-1 *et seq.*; claims under New Jersey law for tortious interference with prospective economic business advantage by Dr. Nanavati and by Dr. Sorenson, each against the other; and defamation claims by the Hospital and Dr. Sorenson against Dr. Nanavati.

These claims were presented to the jury for decision by use of a set of 45 special interrogatories, which were drafted by the parties and the Court and submitted with the consent of all counsel.[7] The jury's determination, as molded by this Court, was as follows:

A verdict of "No Cause for Action" on Dr. Nanavati's § 1981 claim, *see* special interrogatory questions A1-A7; a verdict of "No Cause for Action" in favor of Dr. Sorenson on Dr.

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corded his rights with respect to a full hearing of the charges was affirmed by the Appellate Division of the Superior Court of New Jersey. *Nanavati v. Burdette Tomlin Memorial Hospital et al.*, No. A–3702–84T7, slip op. at 2 (AppDiv. March 7, 1976) (*per curiam*).

6. Dr. Nanavati's discrimination claim originally also included a claim for discrimination due to race or national origin, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* At the conclusion of Dr. Nanavati's proofs, a motion for a directed verdict on this Title VII claim was made by the Hospital. In an opinion and order filed June 23, 1986, this Court granted the motion on the ground that Dr. Nanavati, as a physician, was an independent contractor rather than an employee, and as such, his discrimination claim was not within the ambit of Title VII. In that same opinion, the Court, pursuant to Fed.R.Civ.P. 50, took the defendants' motion for directed verdict with respect to Dr. Nanavati's § 1981 claim under advisement, thereby affording Dr. Nanavati the opportunity of demonstrating, to the jury's satisfaction, that his contractual rights were impaired by the defendants' intentional racial discrimination.

7. A copy of these special interrogatories and the jury's responses thereto is attached to this opinion as appendix A.

Nanavati's antitrust claim, but against the Hospital and its Executive committee, in the amount of $350,000.00, which, tripled pursuant to the Sherman Act totalled $1,050,000.00, (B1-B11); a verdict of "No Cause for Action" in favor of Dr. Sorenson on Dr. Nanavati's claim against him for tortious interference with prospective economic advantage, (C1-C5); a verdict in favor of Dr. Sorenson and against Dr. Nanavati on Dr. Sorenson's claim for tortious interference with prospective economic advantage in the amounts of $100,000.00 as compensatory damages and $300,000.00 as punitive damages, (F1-F5); and, on the defamation claims by the Hospital and Dr. Sorenson against Dr. Nanavati, verdicts in favor of the Hospital in the amounts of $100,000.00 as compensatory damages and $50,000.00 as punitive damages, and in favor of Dr. Sorenson against Dr. Nanavati in the amounts of $100,000.00 as compensatory damages and $500,000.00 as punitive damages. (D1-D7[2d] & E1-E8).

II. DISCUSSION

Motions for a judgment notwithstanding the verdict are governed by Federal Rule of Civil Procedure 50(b), which provides:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

The standard for granting a motion of j.n.o.v. is the same as for a directed verdict. *Skill v. Martinez*, 91 F.R.D. 498, 503

(D.N.J.1981). Such a motion is to be granted only when the evidence, exposed to the light which most strongly favors the party against whom the motion is directed, supports but one reasonable conclusion, and that conclusion contradicts the jury's verdict. *E.g., Hild v. Bruner,* 496 F.Supp. 93, 97 (D.N.J.1980).

Motions for a new trial are governed by Federal Rule of Civil Procedure 59(a). This rule provides, in relevant part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reaons for which new trials have heretofore been granted in actions at law in the courts of the United States . . .

A district court may grant a new trial if doing so would prevent injustice or would correct a verdict which is palpably contrary to the clear weight of the evidence. *American Bearing Co., Inc. v. Litton Industries,* 729 F.2d 943, 948 (3d Cir.), *cert. denied,* 469 U.S. 854, 105 S.Ct. 178, 83 L.Ed.2d 112 (1984); 6A J. Moore, *Moore's Federal Practice* ¶ 59.08[05], at 59-140, 59-152 (2d ed. 1982). In deciding whether the jury's verdict was against the weight of the evidence, a court should be careful not to substitute its judgment for that of the jury. A court is not free to reweigh evidence and set aside a jury verdict merely because it thinks another result is more reasonable. *E.g., Litman v. Massachusetts Mutual Life Ins. Co.,* 739 F.2d 1549 (11th Cir.1984); *Lanza v. Poretti,* 537 F.Supp. 777 (E.D.Pa. 1982). To do so would usurp the jury's prime function, *Borbely v. Nationwide Mutual Ins. Co.,* 547 F.Supp. 959, 980 (D.N.J.1981), thereby eroding the party's Seventh Amendment and common law right to a trial by a jury of his peers. *Shushereba v. R.B. Industries, Inc.,* 104 F.R.D. 524, 527 (W.D.Pa.1985). The authority to grant a new trial, however, is within the broad discretion of the trial court. *Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 36, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980) (per curiam); *American Bearing, supra,* at 948.

A. *Dr. Nanavati's Motions for a Judgment Notwithstanding the Verdict or a New Trial*

Dr. Nanavati contends that certain legal errors, and a record which shows that the jury's verdicts were against the weight of the evidence, require either entry of a j.n.o.v. or granting of a new trial on the defamation claims against him, Dr. Sorenson's tortious interference claim against him, and his own claim for race discrimination. We shall address each of these contentions in turn.

1. *Defamation Claims*

Before delving into the specifics of Dr. Nanavati's contentions regarding the defamation verdicts, it is important to present some chronicle of the procedural history of the defamation claims against him.

On May 10, 1984, Dr. Sorenson filed a complaint against Dr. Nanavati alleging, *inter alia,* that Dr. Nanavati had defamed him. On April 8, 1986, this Court granted Dr. Nanavati's motion for summary judgment with respect to Dr. Sorenson's defamation claim on the ground that Dr. Sorenson had not pled his defamation claim with sufficient particularity, despite the passage of a significant period of time and the concurrent opportunity to supplement or amend his original complaint. Slip op. of April 8, 1986 at pp. 7-10. Shortly thereafter, Dr. Sorenson moved this Court to reconsider that decision to grant summary judgment. In so doing, he specifically requested that the defamation count be restored so that he might pursue a claim based on the allegedly defamatory statements contained in an article entitled "Nanavati: diagnosis led to death," which had been published in *The Sun,* an Atlantic County Newspaper, on May 11, 1983. *See* Dr. Sorenson's memorandum in support of motion for reconsideration at p. 4. We granted Dr. Sorenson's motion, ordering that the summary judgment granted in favor of Dr. Nanavati on Dr. Sorenson's claim be vacated insofar as it precluded Dr. Sorenson's action based on statements contained in the article entitled "Nanavati: diagnosis led to death." Slip op. of May 12,

1986. The alleged defamatory statements in the article, attributed to Dr. Nanavati, were as follows:

> I was concerned about everyone's life after that. I saw that man (the patient's husband) and I had to cover up for this doctor (Sorenson).
>
> [T]he "conservative interpretation" (referring to Dr. Sorenson) probably cost the patient her life.
>
> How can Dr. Meister (the expert who reviewed Dr. Sorenson's reading of the EKGs) be right when the patient is dead[?]
>
> The correct interpretation (of the EKGs) would have saved her life because a pulmonary embolism is fully treatable if it is diagnosed and quickly handled.

In addition to allowing an action on the above statements, this Court permitted Dr. Sorenson to supplement his pleadings, at trial, to assert an additional defamation claim. The statement upon which the additional claim was based was allegedly made in November of 1985 by Dr. Nanavati to a nurse, Anne O'Neil. Ms. O'Neil testified, on June 30, 1986, that Dr. Nanavati had referred to Dr. Sorenson as a "senile old doctor that had been there [at the Hospital] for twenty years killing patients."[8] Trial Transcript of June 30, 1986 at p. 160, lines 14 & 15.

BTMH filed a defamation claim against Dr. Nanavati on May 10, 1983 as a counterclaim to Dr. Nanavati's complaint against it. This defamation claim, as it went to the jury, was

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8. Dr. Nanavati urges that we improperly allowed Dr. Sorenson to supplement the pleadings to assert a defamation claim based on the alleged statement to Ms. O'Neil. We ruled upon this issue in our *ad litem* opinion of July 10, 1986, a copy of which is attached hereto as appendix B, and we rely upon the discussion therein in rejecting Dr. Nanavati's contention here. We conclude now, as we did then, that the pleadings were properly supplemented to include the alleged statement to Anne O'Neil as part of Dr. Sorenson's defamation case.

based on the following statements allegedly made by Dr. Nanavati:

> The correct interpretation of EKGs would have saved her life because pulmonary embolism is fully treatable if it is diagnosed and quickly handled.
>
> I never knew medicine could be so shallow (referring to the practice of medicine at BTMH).

Evidence was presented at trial that, with the exception of the statement allegedly made to Anne O'Neil and the alleged "so shallow" statement, which was apparently made only to Mr. Watson,[9] Dr. Nanavati made all of the above statements both to William Watson, a reporter for the *Atlantic City Press*, and to Don Russell, a reporter for *The Sun*. The articles which ensued from the conversations between Dr. Nanavati and these reporters were admitted into evidence in this case without objection.[10] The article by Mr. Watson, published on May 10, 1983 in the *Atlantic City Press*, entitled "Nanavati: Faces $1M. Countersuit," was admitted as Defendants' Exhibit 1297, and the article by Mr. Russell, published May 11, 1983 in *The Sun*, entitled "Nanavati: Diagnosis led to

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9. The "so shallow" statement was contained in an *Atlantic City Press* article published on May 7, 1983 entitled "Dr. To Fight Until Reinstated," written by William Watson, and admitted as Defendants' Exhibit 1296.

10. More than three weeks after the verdict was returned in this case, counsel for Dr. Nanavati informed the Court that Exhibit 1297, the May 10, 1983 *Atlantic City Press* article, mistakenly had attached to it a page of the May 11, 1983 *Sun* article which contained the above-noted alleged defamatory statements. *See* transcript of August 14, 1986 at pp. 4–8, Counsel for Dr. Sorenson, at oral argument on the present motions, explained that this mistake was of no consequence because the sole bases for Dr. Sorenson's defamation claims were the allegedly slanderous statements to reporter Watson, reporter Russell, and nurse O'Neil. Transcript of August 14, 1986 at pp. 22 & 29. Counsel stressed that Dr. Sorenson did not pursue, as part of his defamation claim, the allegedly libelous statements contained in the May 10, 1983 *Press* article or the May 11, 1983 *Sun* article. *Id.* We shall hold Dr. Sorenson to the representations of his counsel, and we shall proceed with the understanding that Dr. Sorenson's defamation claim is an action for slander.

death," was admitted as Defendants' Exhibit 2153. In addition, the jury heard the testimony of William Watson, the recipient of the alleged slanderous statements and the author of the May 10, 1983 *Press* article.

As previously stated, after four days of deliberation, the jury found that Dr. Nanavati had, in fact, defamed both Dr. Sorenson and the Hospital. The jury's verdict in favor of Dr. Sorenson awarded him $100,000.00 as compensatory damages and $500,000.00 as punitive damages. *See* special interrogatory questions E7 & E8. With respect to the Hospital, the jury awarded $100,000.00 as compensatory damages and $50,000.00 as punitive damages. (D7 & D7[2d]).

a. Listener's Understanding

[1] On his post-trial motions, Dr. Nanavati first contends that the defamation plaintiffs, Dr. Sorenson and BTMH, failed to prove that the actionable defamatory words were understood in their defamatory sense by the listeners. He urges that the evidence in this case with respect to the listeners' understanding is so deficient that no rational jury could have inferred that the statements were understood in their defamatory meaning.[11]

After reviewing the evidence presented to the jury, we must reject Dr. Nanavati's contention. The jurors were clearly presented with the requisite minimum quantum of evidence from which they could infer that the listeners understood the statements made to them as defamatory. With regard to the statements made to the newspaper reporters, Mr. Watson and Mr. Russell, we hold that there was sufficient evidence in the

11. The statements at issue here, by reason of the fact that they impugn the defamation plaintiffs in their business and profession, constitute slander *per se*. *See* Restatement (Second) of Torts § 573 (1981); W. Page Keeton, *Prosser and Keeton on the Law of Torts*, § 112, pp. 788, 790–92 (5th ed. 1984). The fact that they are defamatory *per se*, however, does not obviate the need to establish, to the jury's satisfaction, that the statements were understood to be defamatory. *See* Restatement (Second) of Torts, § 563. Instead, characterizing the statements as slander *per se* merely relieves the defamation plaintiffs from having to prove special damages. Restatement (Second) of Torts, §§ 570 & 573.

record to support an inference regarding the reporters' understanding of the defamatory nature of the words used by Dr Nanavati. Mr. Watson was called as a witness in this case, and his testimony presented the jury with a reasonable basis for inferring his understanding of Dr. Nanavati's statements. Similarly, although Mr. Russell did not testify at the trial, his article published in *The Sun* on May 11, 1983, quoting Dr. Nanavati's allegedly slanderous statements, which was admitted into evidence, displayed his understanding of the alleged slanderous statements in their defamatory sense. The jury's findings as to the meanings of the slander uttered to the reporters thus had sufficient support in the evidence.

With respect to the statement allegedly made by Dr. Nanavati to Ms. O'Neill, we also find ample support in the record for the jury's inference that the statement was understood to be defamatory. Although Ms. O'Neil's testimony with respect to this statement reveals that, upon hearing the statement, she verbally objected thereto, and even protested to Dr. Nanavati that such a view was only his opinion, *see* trial transcript of June 30, 1986 at p. 159, this evidence does not render unreasonable the jury's inference that Ms. O'Neil understood the words to be defamatory. Indeed, this evidence can clearly be said to *support* an inference that Ms. O'Neil fully understood the statement made to be defamatory, since she apparently felt that some protestation was appropriate. At the very least, a jury question was presented regarding Ms. O'Neil's understanding of the statements.

b. Expression of Opinion

Dr. Nanavati has argued extensively that the statements made to reporters Watson and Russell are protected expressions of opinion. With respect to the statements made which resulted in the articles published on May 10, 1983 in the *Press*, and on May 11, 1983 in *The Sun*, we reject Dr. Nanavati's argument without further discussion.[12] In our *ad*

12. Dr. Nanavati also contends that the allegedly defamatory statements made to these reporters, as reported in *The Sun* article, are not ac-

litem opinion filed July 10, 1986, we held that these statements were not protected expressions of pure opinion, *see* op. of July 10, 1986, infra, at p. 1249, and we have not been persuaded that this holding was erroneous.

[2] With regard to the allegedly defamatory statement made to Mr. Watson to the effect that Dr. Nanavati "never knew medicine could be so shallow," Dr. Nanavati urges this Court to hold that this statement was improperly submitted to the jury, both because it was not asserted in the Joint Final Pretrial Order and because it is a protected expression of pure opinion. Although we recognize that this statement, in contrast to the other statements made to reporters which were submitted to the jury, was not asserted as a ground for defamation until the trial was underway—and therefore was not included within the Joint Final Pretrial Order and was not considered by the Court in our *ad litem* ruling regarding the actionable nature of the statements—we nonetheless cannot accept Dr. Nanavati's contention that a j.n.o.v. or a new trial is therefore required. Assuming, without deciding, that the statement at issue here would have been held to have been a protected expression of opinion, had it been submitted to this Court for ruling,[13] we shall not set aside the jury's verdict in favor of the Hospital on this basis. Dr. Nanavati's failure to timely raise this defense with respect to the "so shallow" statement, after having been on notice that the Hospital intended to assert a defamation claim based thereon, *see*

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tionable because they are mere repetitions of earlier statements, which statements are now not actionable by operation of the statute of limitations. We find this argument unpersuasive. Each republication of a defamatory statement constitutes a separate publication, and gives rise to a separate cause of action. *See* Restatement (Second) of Torts § 578, com. b. *See also id.* at § 576; *Toanone v. Williams*, 405 F.Supp. 36, 38 (E.D.Pa. 1975) (applying Pennsylvania law); W. Page Keeton, *Prosser and Keeton on the Law of Torts*, § 113 at p. 799 (5th ed. 1984).

13. A very substantial question regarding the "opinion" status of the statement at issue is raised with respect to whether or not the statement can fairly be said to imply the existence of undisclosed defamatory facts. *See* op. of July 10, 1986, infra, at pp. 1248–50.

transcript of July 15, 1986 at p. 66-67, can be said to constitute a waiver of this defense. Moreover, after a thorough search of the record, we are convinced that no prejudice accrued to Dr. Nanavati by virtue of the submission of this statement to the jury. The evidence in this case is sufficient, without regard to the "so shallow" statement, to support the jury's verdict in favor of the Hospital on the defamation claim.

c. Constitutional Malice

Dr. Nanavati next argues that there was insufficient evidence in the record to establish that he had the requisite constitutional malice at the time he made the statements found by the jury to be defamatory. Because such a state of mind was lacking, he argues, the award of punitive damages was improper.

[3] It is hornbook law that in a defamation action a jury must find by clear and convincing evidence that the defamation defendant made an allegedly defamatory statement with knowledge of its falsity or in reckless disregard of its truth or falsity before it may award punitive damages, *e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50, 94 S.Ct. 2997, 3011-12, 41 L.Ed.2d 789 (1974), and this Court so instructed the jury.[14] It was then the responsibility of the jury, having

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14. The jury was charged, in pertinent part:

Now, with regard to awarding punitive damages, members of the jury, I must inform you that the defamation claims made against Dr. Nanavati require a special showing of the strength of the evidence before you may award punitive damages. To award punitive damages to either the hospital or Dr. Sorensen [sic] based on what Dr. Nanavati said about them which you find to be defamatory, you must find by clear and convincing evidence that Dr. Nanavati made the defamatory communications [sic] knowing that it was false or in reckless disregard for its truth or falsity.

Clear and convincing evidence is that evidence which produces in the minds of the jurors a firm belief or conviction as to the truth of the allegations sought to be established. That is evidence so clear, direct and convincing as to enable the jury to come to a clear conviction without hesitancy of the truth of the precise facts in issue.

With respect to reckless disregard of the truth of [sic] falsity, if you

heard the testimony and observed the manner and demeanor of the witnesses in order to assess credibility, to weigh the evidence and ultimately to reach a determination regarding whether Dr. Nanavati possessed the requisite state of mind to be held responsible in punitive damages. The jury clearly found that he did, awarding the defamation plaintiffs a total of $550,000.00 in punitive damages. *See* special interrogatory question D7[2d] & E8. We are now called upon to review the record to assure that sufficient evidence exists to support that finding. Having done so, we hold that there was ample evidence presented from which the jury could rationally find that Dr. Nanavati's statements were made in reckless disregard of the truth or falsity thereof.[15] Accordingly, we reject Dr. Nanavati's argument that he is entitled to have the punitive damage awards set aside.

d. Falsity and Abuse of Privilege

[4] Dr. Nanavati also urges that the record lacks the minimum quantum of proof to support the jury's findings that the alleged defamatory statements contained in the May 11, 1983 *Sun* article (which were orally conveyed to reporters

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find that Dr. Nanavati entertained serious doubts about the truth of his statements about the hospital or Dr. Sorensen [sic] then you must find that he made them with reckless disregard as to their truth or falsity.

Tr. of July 15, 1986 at pp. 55–56.

15. The jury's finding regarding the existence of "constitutional malice" obviates the need for protracted discussion of another of Dr. Nanavati's asserted bases for new trial. This Court, during trial, ruled that Dr. Sorenson and the Hospital were not public figures for purposes of their defamation claims against Dr. Nanavati. Dr. Nanavati claims, herein, that this ruling constituted prejudicial error, requiring a new trial. The jury found, however, that Dr. Nanavati made the defamatory statements with constitutional malice—with knowledge of the falsity or in reckless disregard of the truth or falsity of the statements. Thus even if the jury had been instructed that Dr. Sorenson and the Hospital were public figures, liability would nonetheless have attached. In short, accepting, *arguendo*, that our ruling regarding the public figure status of these defamation plaintiffs was erroneous, it still cannot be said to have prejudiced Dr. Nanavati in defending the claims against him.

Russell and Watson by Dr. Nanavati) were false, *see* special interrogatory questions D1 and E1, and that he abused his qualified privilege in making said statements.[16] (D5, D6, E5 & E6). Again, our review of the record leads us to disagree. We conclude that there is sufficient basis in the record for the jury to find that the alleged defamatory statements were false and that Dr. Nanavati, in making the statements, abused his qualified privilege.

e. Entire Controversy Doctrine

Dr. Nanavati next contends that the Hospital's defamation claim against him should not have been heard in this federal action by virtue of the New Jersey state court "entire controversy" doctrine, which provides that all matters in controversy between parties are to be disposed of in a single action. *E.g.,New Jersey Highway Authority v. Renner,* 18 N.J. 485, 492, 114 A.2d 555 (1955). In support of this argument, however, Dr. Nanavati cites no authority for the proposition that this Court is required to apply that New Jersey doctrine, and nothing has been presented which suggests that a federal court is precluded from hearing a pendant state law claim by operation of such a doctrine. Although of course it is true that there is a federal policy in favor of judicial economy and against claim splitting, we have determined that such judicial economy was best served in this case by disposing of all outstanding claims by the parties in this federal forum. Nothing presented upon these motions persuades us that some other treatment of the state law claims was more appropriate.[17]

2. *Dr. Sorenson's Tortious Interference Claim*

Dr. Nanavati also seeks a judgment notwithstanding the

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16. Dr. Nanavati has also asserted, on this motion, that the Hospital failed to prove special damages on its defamation claim. We held, in our *ad litem* opinion of July 10, 1986, that such proof was not required and therefore we do not address this contention here.

17. Indeed, there is some cause for doubt whether the Hospital's defamation claim had even accrued at the time the Hospital filed its counterclaim in the state court action.

verdict on Dr. Sorenson's tortious interference claim. He urges that the jury's verdict, as to both liability and damages, is legally insufficient and should be set aside. The elements for the tort of tortious interference, discussed in *Zippertubing Company v. Teleflex, Inc.*, 757 F.2d 1401, 1409-12 (3d Cir.1985), were set forth in the jury charge as follows:

> In order for . . . Dr. Sorensen [sic] to recover damages on this claim, first, he must prove existence of a reasonable expectation of economic advantage or benefit belonging to him. Second, that the other doctor had knowledge of that expectation of economic advantage. Third, that the other doctor wrongfully and without justification interfered with his reasonable expectation of economic advantage or benefits. Fourth, that in the absence of the alleged wrongful act of the other doctor it is reasonably probable that he would have realized his economic advantage or benefit, and fifth, that he sustained damages as a result of this activity.

Transcript of July 15, 1986, at pp. 38-39, lines 18-7.

[5] Although Dr. Nanavati contends that there was no evidence of a causal connection between his actions and the subsequent harm to Dr. Sorenson's business, our review of the record reveals that this argument is without merit. It was well within the province of the jury to conclude that, despite other possible reasons for Dr. Sorenson's business decline, Dr. Nanavati's conduct was a proximate cause thereof. Sufficient evidence was presented from which such an inference could be drawn, and we shall not usurp the jury's function by concluding otherwise.

[6] Dr. Nanavati also contests the jury's award of $100,000.00 as compensatory damages on Dr. Sorenson's tortious interference claim. Specifically, he urges that the record lacked the minimum quantum of evidence from which the jury could have found that Dr. Nanavati's tortious behavior caused Dr. Sorenson $100,000.00 in actual damages. The law is quite clear, however, that when a party has been damaged by the legal wrong of another, he shall not be denied recompense merely because the exact amount of damage is uncer-

tain. *E.g., Kyriazi v. Western Electric Co.*, 465 F.Supp. 1141, 1146 (D.N.J. 1979). A jury's damage award will be sustained if, though not mathematically precise, it constitutes a reasonable estimate without speculation or conjecture. *E.g., First National Bank of Chicago v. Jefferson Mortage Co.*, 576 F.2d 479, 494-95 (3d Cir. 1978). Despite Dr. Nanavati's protestations to the contrary, we are convinced that the jury's award of $100,000.00 in compensatory damages to Dr. Sorenson on his tortious interference claim was not the product of guesswork, but was a reasonable estimate of damages based on the evidence presented.[18]

3. *Dr. Nanavati's § 1981 Discrimination Claim*

Dr. Nanavati urges that a new trial is mandated on his § 1981 claim because the jury's finding that no racial discrimination occurred is against the clear weight of the evidence. This assertion is wholly without merit. Having reviewed the record, we hold that there was substantial evidence from which the jury could have reasonably concluded that Dr. Nanavati was not treated differently because of his race. It is not our function, on these motions, to substitute our judgment for that of the jury, and we decline to do so.

4. *Evidentiary Ruling on Rebuttal Testimony*

[7] Dr. Nanavati contends that it was prejudicial error to preclude Dr. David Volpi, a former emergency room physician and a rebuttal witness, from testifying as to his conversations with Dr. Gus Engstrom, the director of the emergency room.

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18. Dr. Nanavati also contends that the awards made to Dr. Sorenson on his business interference claim, as well as those to Dr. Sorenson, the Hospital, and its Executive Committee on the defamation claims, were so excessive as to require a new trial. We cannot agree, and shall deny Dr. Nanavati's request for a new trial based on that contention. With respect to the punitive damages awarded, testimony was adduced to show that Dr. Nanavati has a net worth in excess of $1,622,410.00 tr. of July 7, 1986 at p. 65, and an annual gross income approaching $500,000.00. Tr. of July 7, 1986 at p. 30. On this record, we cannot say that the awards made are excessive.

The offer of proof made by Dr. Nanavati was that Dr. Volpi would testify essentially as follows: In or about August 1983, Dr. Volpi was told by Dr. Engstrom that he was referring too many patients to Dr. Nanavati, and that Dr. Sorenson had discussed this with Dr. Engstrom. Dr. Nanavati's attorney, during his direct examination of Dr. Volpi, tried to elicit that testimony in the following manner:

Q: And let me direct your attention to in or about August of 1983. Did you have a conversation with Dr. Engstrom about your referral of cases to Dr. Nanavati?

A: Yes, I did.

Trial transcript of July 9, 1986 at p. 107 lines 19-23. Upon objection, this Court ruled that the witness' recitation of Dr. Engstrom's comments would constitute inadmissible hearsay testimony. Counsel, as a result of the Court's ruling, pursued the following line of questioning without objection:

Q: As a result of this conversation with Dr. Engstrom, did you change your referral patterns to Dr. Nanavati?

A: Yes, I did.

Q: What did you do?

A: I decreased the amount of patients I referred to him.

Trial transcript of July 9, 1986 at p. 108, lines 7-14.

For the first time, Dr. Nanavati contends that our ruling sustaining the hearsay objection was "erroneous and prejudicial to [his] ability to tie Dr. Sorenson in to the group boycott which the jury found involved the Hospital and the Executive Committee." Dr. Nanavati's amended brief at p. 26.

Upon review of the ruling we conclude that Dr. Volpi's proffered testimony regarding Dr. Engstrom's conversation was properly excluded. While it is possible that Dr. Engstrom may be an agent of the Hospital for some purposes, and as such his statements would be admissible under Fed.R.Evid. 801(d)(2)(D), relaying messages from non-emergency room physicians to emergency room physicians about emergency room referrals was not an activity within the scope of Dr. Engstrom's agency. Further, the record did not demonstrate a sufficient nexus between Dr. Sorenson and the "conspiracy" to permit the introduction of Dr. Volpi's hearsay testimony

pursuant to Fed.R.Evid. 801(d)(2)(E) (admissibility of statements by co-conspirators). Finally, to the extent that Dr. Sorenson's alleged statement was merely cumulative of evidence presented in the direct case, we find that no possible prejudicial harm could have accrued to Dr. Nanavati.

B. *BTMH and the Executive Committee's Motions for Judgment Notwithstanding the Verdict or a New Trial*

[8] BTMH and the Executive Committee have moved for judgment notwithstanding the verdict with respect to Dr. Nanavati's antitrust claims, alleging prejudicial legal error by this Court[19] and proofs insufficient, as a matter of law, to support the jury's verdict. For the reasons which follow, this Court, cognizant of our obligation not to substitute our judgment for that of the jury, feels constrained to agree with the antitrust defendants that a judgment of "No Cause for Action" must be entered against Dr. Nanavati on the antitrust claims, notwithstanding the jury's verdict.

After hearing 8 weeks of testimony, deliberating 4 full days, and requesting and receiving a complete recharge on antitrust law, the jury found that Dr. Sorenson, the sole individual charged with an antitrust violation, had not participated in any antitrust violation. Notwithstanding this finding, the jury also found that a contract, combination or conspiracy in restraint of commerce existed, special interrogatory question B-1, and that the two remaining antitrust defendants, BTMH and the Executive Committee, were participants therein. (B2 & B3). Despite a thorough review of the record,

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19. The most significant of these alleged legal errors was this Court's decision, as set forth in our *ad litem* opinion of June 24, 1986, allowing Dr. Nanavati to amend his pleadings, at the close of his case, to name the Hospital and the Executive Committee as defendants on the antitrust claim. Although we consider this allegation of error somewhat questionable, particularly in light of the antitrust defendants' refusal to accept the opportunity afforded them to cure potential prejudice at the time of trial, *see* slip op. June 24, 1986 at pp. 6–7 (D.N.J.), we need not rule upon this issue. Because we hold that judgment in favor of the Hospital and the Executive Committee must be entered, notwithstanding the jury's verdict, this assertion of prejudicial error, like the others pertaining to the antitrust claim, is moot.

we are unable to find evidence in this case to support a finding that the Hospital and the Executive Committee, the defendants who were not exonerated by the jury, committed a violation of the antitrust laws. Specifically, in light of the jury's exoneration of Dr. Sorenson, the record is devoid of evidence to support a finding that either the Hospital or the Executive Committee participated in any conspiracy designed to stifle competition or engaged in any unlawful restraint of trade which had an anticompetitive effect.

Because we were extemely reluctant to set aside any portion of the verdict in this enormously complicated case, we have made every effort to preserve the jury's findings and decision. We have carefully searched the voluminous record of this case in an effort to locate evidence to support a finding that BTMH and the Executive Committee participated in a conspiracy violative of the antitrust laws, and we have attempted to discern, in the absence of more explicit jury findings,[20] the basis for the jury's apparent conclusion[21] that a contract, combination or conspiracy in restraint of interstate commerce existed. Our attempts to locate evidence from which a rational fact-finder could conclude that the Hospital and the Executive Committee participated in such a conspiracy, while Dr. Sorenson did not, have been futile. We are convinced that judgment must be entered in favor of BTMH and the Executive Committee on the antitrust claim.[22] There

20. Our authority to attempt such a determination, given the parties' decision not to submit a special interrogatory which specifically asked the jury whether persons who were not named as defendants in the action participated in the alleged conspiracy, cannot seriously be disputed in light of Fed.R.Civ.P. 49, which provides for express fact-finding by the trial court when the parties have failed to properly submit any issue to the jury.

21. Of course, in light of the record here, we cannot help but consider the possibility that the jury in this case, after 8 weeks of trial and 4 days of deliberation, reached a compromise in the verdict.

22. Dr. Nanavati was permitted, when allowed to amend his complaint, to include an antitrust claim under New Jersey law, N.J.S.A. § 56:9–1 *et seq.*, as well as federal law. *See* slip op. of June 24, 1986 (D.N.J.) at p. 2, n 2. For purposes of the present motion, however, no party has argued that any difference exists between the state law and the federal law, and therefore we need not differentiate between these claims.

is simply no evidence in this case which supports the imposition of liability for an antitrust violation against BTMH or the Executive Committee, in light of the jury's rejection of Dr. Nanavati's original theory that Dr. Sorenson influenced or masterminded the alleged anticompetitive activities.

In our effort to preserve the jury's verdict, we have considered a number of alternative legal theories which might support the imposition of liability against the defendants herein, but have found that our attempts to locate factual bases for these theories in the record have been unavailing. We shall discuss each theory in turn.

The most obvious interpretation of the jury's responses to the antitrust special interrogatories, and the one which the defendants urge upon the Court, is the finding that BTMH *conspired with* the Executive Committee. Such a factual finding, defendants contend, would result in the need for this Court to "mold" the jury's verdict to reach a verdict of "No Cause for Action." Defendants rely, in making this argument, on *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir.1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985), in which the Third Circuit held that the medical staff of the hospital[23] and the hospital itself could not, as a matter of law, "conspire" with one another. 745 F.2d at 817. The medical staff involved in the *Weiss* case had been empowered to make staff privilege decisions on behalf of the hospital, and in making such decisions, the Third Circuit explained, the medical staff therefore acted as an officer of the corporate hospital. 745 F.2d at 817. Since the medical staff, as an entity, had no "interest in competition with the hospital," *id.*, there could not be, as a matter of law, a conspiracy between the medical staff and the hospital with respect to staff privilege decisions. In keeping with the reasoning in *Weiss*,[24] the jury in the present

23. We have not identified, nor have the parties urged us to find, any legally significant difference between the full medical staff, the defendant at issue in *Weiss*, and the Executive Committee of the Medical Staff, the defendant entity at issue here.

24. Although there is an apparent difference between the decision-making process employed at the hospital involved in *Weiss*, where the med-

case was charged that BTMH and the Executive Committee could not, as a matter of law, conspire with one another.[25] Not having been persuaded that this charge was incorrect, we hold that the jury's verdict with respect to the antitrust claim, if indeed it is based upon a finding that the Executive Committee and the Hospital conspired, cannot stand. Particularly in light of the fact that the jury was instructed *twice* on this point, however, we are unwilling to assume that the jurors' intent was to find a conspiracy between these two defendants regarding the termination of Dr. Nanavati's staff privileges. Instead, on this motion, we have attempted to discern alternative interpretations for the jury's interrogatory answers, including considering the possibility that the jury found separate or distinct antitrust violations for each defendant.

With respect to the Executive Committee, the single ground asserted by Dr. Nanavati which presents even a colorable antitrust claim is the Executive Committee's decision to recommend that Dr. Nanavati's staff privileges be terminated. This decision, made as it was by a "combination" of individual competitors, could, under *Weiss, supra,* at 814, support antitrust liability without regard to the involvement of any other entity. In order to impose antitrust liability, however, more is required than just proof of some action taken by the group. The action taken must have been one which was anticom-

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ical staff makes privilege decisions, and that at BTMH, where the Executive Committee of the Medical Staff is empowered only to make recommendations regarding staff privileges, none of the parties has argued that *Weiss* is distinguishable by virtue of this difference, and we attach no legal significance thereto. *See generally,* Kissam, Webber, Bigers and Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom,* 70 Calif.L.Rev. 595, 603–613 (1982).

25. The jury was charged, in pertinent part:

> "In order to prove the first element Dr. Nanavati must prove that two or more distinct entities agreed to take action against him. Bear in mind that the hospital and its medical staff cannot conspire between and among themselves in violation of the Sherman Act."

Tr. of July 15, p. 29, lines 7–12; Tr. of July 16, p. 6, lines 6–11. No exception was taken to this portion of the charge.

petitive. If this were not so, *every* action taken by the "combination" would be violative of the antitrust laws.[26] Such a result could not be countenanced, of course where, as here, there are legitimate reasons for the existence of the organized group of competitors.[27]

In order for the action taken by an antitrust defendant to be considered one which constitutes a violation of the antitrust laws, that action must be anticompetitive in purpose or effect. *E.g., McLain v. Real Estate Board of New Orleans,* 444 U.S. 232, 243, 100 S.Ct. 502, 509, 62 L.Ed.2d 441 (1980). *See also Tose v. Pennsylvania Bank,* 648 F.2d 879, 892 n. 17 (3d Cir.), *cert. denied,* 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981). Thus, the Executive Committee's recommendation that Dr. Nanavati's staff privileges be revoked would conceivably be an acceptable predicate for antitrust liability if it were anticompetitive in purpose or effect. Nothing in the record of this case, however, supports a finding that the Executive Committee's action, irrespective of how unreasonable the jury might have believed it to be, was motivated by an anticompetitive purpose or had an anticompetitive effect, as these terms are defined in antitrust law.

There is a complete dearth of evidence to support an inference that the Executive Committee, as an entity, had any anticompetitive motive or purpose with respect to its recommendation concerning Dr. Nanavati's staff privileges. Furthermore, there is no evidence that any of the individuals who

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26. The language used by the *Weiss* court arguably suggests this result, since the court stated that "... *any* action taken by the medical staff satisfies the 'contract combination, or conspiracy' requirement of section 1." 745 F.2d at 814 (emphasis added). The present case is clearly distinguishable from *Weiss,* of course, in that the circumstances of *Weiss,* wherein osteopathic doctors, as a class, were purportedly excluded from admission to a medical staff by the allopathic doctors already on the staff, presented, in contrast to the circumstances of this case, a situation rife with economic competition.

27. The legitimacy of the formation of an executive committee of the medical staff and the delegation of authority to that committee to recommend decisions regarding staff privileges is beyond dispute.

served as members of the Executive Committee were, as individual physicians, motivated in any respect by any desire for personal economic gain.[28] On such a record there is obviously no rational basis for concluding that the Executive Committee acted with an anticompetitive animus.

Dr. Nanavati has argued, in opposition to defendants' present motion, that proof of an anticompetitive effect is sufficient to support the imposition of liability under the Sherman Act even without a showing of anticompetitive purpose. Dr. Nanavati's amended brief in opposition to defendants' motions at p. 18. Accepting as true the proposition that the antitrust law requires proof only of either anticompetitive purpose *or* effect, *but cf., Borger v. Yamaha International Corp.*, 625 F.2d 390, 397 & n. 4 (2d Cir.1980) (expressing doubt whether the "purpose or effect" requirement "is a disjunctive rule"), we are nonetheless unable to find evidence in this case which supports the imposition of liability against either the Hospital or the Executive Committee for an antitrust violation arising out of the revocation of Dr. Nanavati's staff privileges. The record simply does not permit a finding that the decision to revoke Dr. Nanavati's staff privileges produced anticompetitive effects.

Although it is of course true that the termination of Dr. Nanavati's staff privileges would have had a deleterious effect on his ability to treat cardiac patients within Cape May County who required hospitalization,[29] it is equally true that this effect alone, in the absence of an anticompetitive intent, cannot support a verdict against the entities causing the effect. The antitrust laws are designed to protect *competition*,

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28. Indeed, even the existence of a *potential* for economic gain by the Executive Committee members cannot be found in this record. No direct economic incentive to stifle competition existed, since none of these physicians practiced cardiology, and no indirect economic incentive of any kind was proven.

29. As a factual matter, we note that Dr. Nanavati, by virtue of his attainment of a temporary restraining order—and then a permanent injunction—from the New Jersey Superior Court, was without staff privileges for only 5 days.

not *competitors. E.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962). Nothing in this case supports a finding that the revocation of Dr. Nanavati's privileges was either motivated by a desire to stifle competition or that it substantially impaired competition. It is uncontroverted that, with the possible exception of Dr. Sorenson, *see* trial transcript of June 2, 1986 at p. 73, lines 19-21; trial transcript of June 4, 1986 at p. 16, lines 18-21, *but cf.,* trial transcript of June 5, 1986 at pp. 97-98, lines 17-5 (Dr. Sorenson sent Dr. Nanavati flowers as a welcoming gift), all of the persons involved in this matter believed in the need for and/or desired to have an additional cardiologist engaged in practice within Cape May County. Dr. Nanavati's own testimony was that he was welcomed with open arms by the other physicians. *See* trial transcript of June 4, 1986 at p. 16, lines 22-24. The proofs do not support an inference, unless such is drawn solely from the fact that the Hospital and the Executive Committee acted to revoke Dr. Nanavati's staff privileges, that the Hospital and the Executive Committee's activities substantially impaired competition or unreasonably restrained trade. Indeed, the evidence adduced at trial belies any such inference. With respect to Dr. Nanavati's own practice, it is uncontested that the number of patients he treats rose from approximately 1,200 at the time of the filing of the original complaint in this action to 4,000 at the time of the trial. Trial transcript of June 13, 1986, pp. 82-85. Furthermore, the proofs showed that a new cardiologist, Dr. Mark Sorenson, entered the "market" during the time period critical to this case.

With respect to the potential liability of the Hospital, we have considered the possibility that an entity other than the Executive Committee, such as an individual physician, might have been found by the jury to have engaged in a conspiracy with the Hospital. Our review of the record of this case, however, again leaves us convinced that no evidence supports the conclusion that the Hospital committed any violation of the antitrust laws, even under this theory.

In keeping with the current state of the law regarding intracorporate conspiracy, *see e.g., Weiss, supra,* at 813 n. 43

(citing *Johnston v. Baker,* 445 F.2d 424, 426-27 (3d Cir.1971) (corporate officers or employees, if they act for their own interests, and outside the interests of the corporation, are legally capable of conspiring with their employer for purposes of § 1 of Sherman Act)), this Court charged the jury, in relevant part, that:

> As heretofore stated, in order for you to find that a conspiracy existed under the Sherman Act, you must determine that at least two independent persons or entities took part in the alleged conspiracy. A corporation cannot conspire with itself any more than a private individual can. And it is the general rule that the acts of the agent are the acts of the corporation. Therefore, the Sherman Act does not prohibit an agreement combination or conspiracy, which consists merely in the fact that the officers and other agents of the hospital did their day-to-day jobs of formulating and carrying out its policies. Burdette Tomlin is a corporation. And as such it can act only through its officers and representatives. It does not violate the Sherman Act when it exercises its rights through its officers and agents, which is the only medium through which it can possibly act.
>
> However, if you find that one or more of the individual physicians at the hospital acted in regard to Dr. Nanavati in whole or in part for private economic motives, then you may find that a conspiracy existed.

Trial transcript of July 15, 1986, pp. 32-33, lines 18-15; tr. of July 16, 1986, pp. 9-10, lines 22-21.[30]

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30. The Hospital excepted to this point of the charge, tr. of July 15, 1986 at p. 77, lines 5–11, and despite the fact that this charge had been submitted by plaintiff as a proposed point for charge, and that the Hospital had not previously objected, informed this Court during oral argument on the present motion that it was surprised to hear this point in the jury instructions. Tr. of August 14, 1986 at p. 63. Defendants also argued on this motion, for the first time, that plaintiff was required to *identify* the specific conspirators who were not named defendants. *See* defendants' supplemental brief at p. 5. Our holding here is based upon the lack of factual support for a finding that any such independent co-conspirator existed, not upon a change in belief with respect to the accuracy of the charge as a statement of

The jury's responses to the special interrogatories indicated their finding that the antitrust violation took the form of a group boycott, special interrogatory question B6, and that this boycott was motivated by Dr. Nanavati's "unprofessional behavior or violations of public service or other ethical norms." (B-7). These findings, which were elicited by the special interrogatories in order to discern whether the "rule of reason" approach to analyzing the alleged anticompetitive activity should be implemented, *see* slip op. of July 8, 1986 (*ad litem*),[31] might suggest that the jury found that a group boycott existed with respect to the referral of patients to Dr. Nanavati. A significant amount of testimony was elicited during the trial regarding the alleged decrease in the number of patient referrals Dr. Nanavati was receiving. This evidence, taken in the light most favorable to Dr. Nanavati, might, of course, support at least a preliminary inference that this decrease in referrals was the result of anticompetitive activity.[32] Any such boycott involving referrals, however, would obviously have to have been shown to implicate one of the named defendants in this case in order to support the imposition of antitrust liability. Because we have been unable to locate evidence in the record which constitutes such a showing, and we note that Dr. Nanavati has not even argued, on this motion, that the Hospital (or its Executive Committee) was implicated in any such conspiracy regarding referrals, we find no basis for a verdict on the antitrust claim against the

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the law. We do not reach defendants' assertions regarding a need for plaintiff to specifically identify unnamed conspirators.

31. No objection or challenge to our ruling on the issue of the appropriate approach to analyzing anticompetitive behavior in the circumstances of this case, as discussed in our July 8, 1986 *ad litem* opinion, a copy of which is attached hereto as appendix C, has been raised on the present motion.

32. We do not reach the issue whether sufficient evidence was adduced to sustain a verdict based upon this inference. Whether the alleged decrease in referrals was in fact the product of *concerted* activity by the other physicians, and whether any physician's decision to decrease referrals was based on reasons which were not legitimate, are, of course, issues properly within the jury's province.

Hospital or the Executive Committee arising from any decrease in patient referrals. Moreover, there was considerable testimony by several members of the Medical Staff, some of whom were his friends and neighbors who had for some time referred hundreds of patients to Dr. Nanavati for cardiac consultation and care, and had ceased to do so. Their reasons advanced for so doing were his failure to report his findings to them, his costly fees, his subjecting the patients to numerous unnecessary and expensive tests, his treatment of them for non-cardiac conditions and then failure to return for general practice care resulting in their loss of patients. *See* e.g., trial transcripts of June 24, 1986 at pp. 40-43, 57-62, of June 25, 1986 at pp. 5-19, 24-27, and of June 30, 1986 at pp. 88-92.

Dr. Nanavati relies heavily, in support of his argument that liability under the antitrust laws can properly be imposed against the Hospital in this case, on the fact that the Hospital contracted with a pulmonary specialist, Dr. Henry J. Komansky, for the exclusive official reading and interpretation of stress tests and echocardiograms. *See* Dr. Nanavati's amended brief in opposition to defendants' motions at p. 9. For reasons substantially similar to those just expressed with regard to the termination of staff privileges, this exclusive contract cannot, on the record of this case, support a verdict against the Hospital. In the absence of evidence of an anticompetitive intent with respect to entry into the contract, antitrust liability might be imposed against the Hospital only if its activity had an anticompetitive effect. The touchstone for antitrust liability is the ultimate effect on *competition*, not that on individual competitors, and the record is devoid of factual bases on which to ground liability against the Hospital. Mere proof of the fact that a hospital entered into an exclusive contract for certain professional services is not, in itself, proof of an unreasonable anticompetitive effect. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 29 n. 48 & 30 n. 51, 104 S.Ct. 1551, 1567 n. 48 & 1568 n. 51 (1984). Exclusive service contracts are not illegal, nor are they uncommon in a hospital setting. It is uncontroverted that the Hospital was not legally required to put such con-

tracts out for open bid, and there was, in this case, absolutely no proof that the decision to award an exclusive contract to Dr. Komansky and his medical group was either motivated by an anticompetitive purpose or that the award of that contract had an anticompetitive effect. In short, there is no evidence here to support the imposition of antitrust liability against the Hospital based on its decision to award an exclusive contract to Dr. Komansky's medical group nor against the Hospital or the Executive Committee for any other valid reason. Accordingly, we are of the belief that all we have here is an unfortunate personal feud between Drs. Nanavati and Sorenson.

III. CONCLUSION

For the reasons expressed in this opinion, our rulings on the present motions are as follows: the motion for j.n.o.v. and new trial made by Dr. Nanavati shall be denied. The motion for j.n.o.v. by the Hospital and the Executive Committee shall be granted. The judgment previously entered in favor of Dr. Nanavati against said defendants, in the amount of $1,050,000.00, shall be vacated, and a judgment of No Cause for Action shall be entered in lieu thereof. The Court shall enter an appropriate order.

APPENDIX A

Suketu H. Nanavati, M.D.,	:	Hon. Mitchell Cohen
	:	U.S. District Court
v.	:	District of New Jersey
	:	
Burdette Tomlin Memorial Hospital, The Executive Committee of the Medical Staff of Burdette Tomlin Memorial Hospital and Dr. Robert J. Sorensen, M.D.	:	No. 83-0793
DR. ROBERT J. SORENSEN, M.D.,	:	
	:	
v.	:	No. 84-1790
	:	
SUKETU H. NANAVATI, M.D.	:	

SPECIAL INTERROGATORIES

SECTION A: Dr. Nanavati's Racial Discrimination Claim

A1. Was racial discrimination a substantial factor in the process of revocation of Dr. Nanavati's medical staff privileges at the Hospital?

Yes ___ No ✓

IF YOUR ANSWER TO QUESTION A1 IS YES, ANSWER QUESTION A2. OTHERWISE GO ON TO QUESTION A3

A2. (a) Did the Hospital participate in such racial discrimination?

Yes ___ No ___

(b) Did the Executive Committee participate in such racial discrimination?

Yes ___ No ___

(c) Did Dr. Sorensen participate in such racial discrimination?

Yes ___ No ___

A3. Was racial discrimination against Dr. Nanavati a substantial factor in the decision by the Hospital to enter into an exclusive contract with Dr. Komansky's group for the reading and interpreting of echocardiograms and stress tests?

Yes ___ No ✓

IF YOUR ANSWER TO QUESTION A3 IS YES, ANSWER QUESTION A4. OTHERWISE GO ON TO QUESTION A5

A4. (a) Did the Hospital participate in such racial discrimination?

Yes ___ No ✓

(b) Did the Executive Committee participate in such racial discrimination?

Yes ___ No ✓

(c) Did Dr. Sorensen participate in such racial discrimination?

Yes ___ No ✓

IF YOUR ANSWER TO EITHER QUESTION A1 OR A3 IS YES, ANSWER QUESTION 5. OTHERWISE GO ON TO SECTION B

A5. Was Dr. Nanavati damaged by such racial discrimination?

Yes ___ No ✓

IF YOUR ANSWER TO QUESTION A5 IS YES, ANSWER QUESTION A6. OTHERWISE GO ON TO SECTION B

A6. What is the amount of damages you award for the harm caused to Dr. Nanavati by the racial discrimination?

$_____

A7. If you find that punitive damages should be awarded by reason of such discrimination, set forth the amount of such punitive damages you find as to each defendant (only if you have answered yes as to that defendant in either Question A2 or A4):

Hospital $_____

Executive Committee $_____

SECTION B: Dr. Nanavati's Antitrust Claims

B1. Was there a contract, combination, or conspiracy in restraint of interstate commerce?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION B1 IS YES, ANSWER QUESTION B2. OTHERWISE GO ON TO SECTION C

B2. Was the Hospital part of the contract, combination, or conspiracy?

Yes ✓ No ___

B3. Was the Executive Committee part of the contract, combination, or conspiracy?

Yes ✓ No ___

B4. Was Dr. Sorensen part of the contract, combination, or conspiracy?

Yes ___ No ✓

IF YOUR ANSWER TO ANY OF QUESTIONS B2 OR B3 OR B4 IS YES, ANSWER QUESTION B5. OTHERWISE GO ON TO SECTION C

B5. Did any of the participants perform any act in furtherance of the contract, combination, or conspiracy?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION B5 IS YES, ANSWER QUESTION B6. OTHERWISE GO ON TO SECTION C

B6. Did the contract, combination, or conspiracy take the form of a group boycott?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION B6 IS YES, ANSWER QUESTION B7, OTHERWISE GO ON TO QUESTION B8

B7. Was Dr. Nanavati boycotted because of unprofessional behavior or violations of public service or other ethical norms?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION B7 IS YES, ANSWER QUESTION B8. OTHERWISE GO ON TO QUESTION B9

B8. Did the contract, combination, or conspiracy constitute an unreasonable restraint on interstate commerce?

Yes ✓ No ___

B9. Did the contract, combination, or conspiracy injure Dr. Nanavati in his business or property?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION B9 IS YES, ANSWER QUESTION B10. OTHERWISE GO TO SECTION C

B10. Did Dr. Nanavati first sustain injury before June 5, 1980?

Yes ___ No ✓

B11. What is the amount of damages which Dr. Nanavati sustained because of the contract, combination, or conspiracy?

$350,000.00

IF YOU ANSWERED QUESTION C4, ANSWER QUESTION C5. OTHERWISE GO ON TO SECTION D

C5. If you find that punitive damages should be awarded by reason of such interference, what is the amount of such punitive damages?

$\$$_____

SECTION D: The Hospital's Slander Claims

D1. Were any of Dr. Nanavati's statements, which the Hospital claims are defamatory, false?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION D1 IS YES, ANSWER QUESTION D2. OTHERWISE GO ON TO SECTION E

D2. Did those false statements defame the Hospital?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION D2 IS YES, ANSWER QUESTION D3. OTHERWISE GO ON TO SECTION E

D3. Was Dr. Nanavati at least negligent in making those false statements?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION D3 IS YES, ANSWER QUESTION D4. OTHERWISE GO ON TO SECTION E

D4. Was the Hospital harmed by those statements?

Yes ✓ No ___

D5. Were those statements privileged?

Yes ✓ No ___

IF YOUR ANSWER TO QUESTION D5 IS YES, ANSWER QUESTION D6. IF YOUR ANSWER IS NO, GO ON TO QUESTION D7

D6. Was Dr. Nanavati motivated by ill will or malicious intent to harm the Hospital?

Yes _✓_ No ___

D7. What is the amount of damages you award for the harm caused to the Hospital by the defamation?

$100,000.00

IF YOU ANSWERED QUESTION D6, ANSWER QUESTION D7. OTHERWISE GO ON TO SECTION E

D7. If you find that punitive damages should be awarded because of the defamation, what is the amount of those punitive damages?

$50,000.00

SECTION E: Dr. Sorensen's Slander Claims

E1. Were any of Dr. Nanavati's statements, which Dr. Sorensen claims defamed him, false?

Yes _✓_ No ___

IF YOUR ANSWER TO QUESTION E1 IS YES, ANSWER QUESTION E2. OTHERWISE GO ON TO SECTION F

E2. Did those false statements defame Dr. Sorensen?

Yes _✓_ No ___

IF YOUR ANSWER TO QUESTION E2 IS YES, ANSWER QUESTION E3. OTHERWISE GO ON TO SECTION F

E3. Was Dr. Nanavati at least negligent in making those false statements?

Yes _✓_ No ___

IF YOUR ANSWER TO QUESTION E3 IS YES, ANSWER QUESTION E4. OTHERWISE GO ON TO SECTION F

E4. Was Dr. Sorensen harmed by those statements?
Yes _✓_ No ___

E5. Were those statements privileged?
Yes _✓_ No ___

IF YOUR ANSWER TO QUESTION E5 IS YES, ANSWER QUESTION E6. IF YOUR ANSWER IS NO, GO ON TO QUESTION E7

E6. Was Dr. Nanavati motivated by ill will or malicious intent to harm the Dr. Sorensen?
Yes _✓_ No ___

E7. What is the amount of damages you award for the harm caused to Dr. Sorensen by the defamation?
$100,000.00

IF YOU ANSWERED QUESTION E7, ANSWER QUESTION E8. OTHERWISE GO ON TO SECTION F

E8. If you find that punitive damages should be awarded because of the defamation, what is the amount of those punitive damages?
$500,000.00

SECTION F: Dr. Sorensen's Interference With Business Claim

F1. Did Dr. Nanavati interfere with Dr. Sorensen's existing or future business relations?
Yes _✓_ No ___

IF YOUR ANSWER TO QUESTION F1 IS YES, ANSWER QUESTION F2. OTHERWISE GO ON TO SECTION G

F2. Was Dr. Nanavati's conduct privileged?
Yes _✓_ No ___

IF YOUR ANSWER TO QUESTION F2 IS YES, ANSWER QUESTION F3. OTHERWISE GO ON TO QUESTION F4

F3. Was Dr. Nanavati motivated by ill will or malicious intent to harm Dr. Sorensen?

Yes _✓_ No ___

F4. What is the amount of damages caused to Dr. Sorensen by the interference?

$100,000.00

IF YOU ANSWERED QUESTION F4, ANSWER QUESTION F5. OTHERWISE GO ON TO SECTION G

F5. If you find that punitive damages should be awarded by reason of the interference, what is the amount of the punitive damages?

$300,000.00

SECTION G: Total Recoveries

G1. If you have awarded damages to Dr. Nanavati in two or more of Questions A6, B11, and C4, what is the actual amount you award for those combined damages so as not to duplicate them?

$_____

G2. If you have awarded damages to Dr. Sorensen in Questions E7 and F4, what is the actual amount you award for those combined damages so as not to duplicate them?

$200,000.00

G3. If you have awarded punitive damages to Dr. Sorensen in Questions E8 and F5, what is the actual amount you award for those combined punitive damages so as not to duplicate them?

$800,000.00

APPENDIX B
NOT FOR PUBLICATION
Civil Action Nos. 83-0794, 84-1790

OPINION
July 10, 1986

COHEN, Senior District Judge:

Presently before the Court are requests for rulings on four issues relating to the defamation claims against Suketu H. Nanavati. The first issue is whether we should grant Dr. Sorenson's motion *ad litem* to amend his pleadings pursuant to Fed.R.Civ.P. 15, to state a new defamation claim against Dr. Suketu H. Nanavati. The second issue is whether the statements which form the basis of the defamation claims are actionable. The third issue is whether Burdette Tomlin Memorial Hospital (BTMH), as an incorporated entity, and a defamation plaintiff herein, must prove special damages in order to have a viable defamation claim. The fourth is whether either Dr. Robert J. Sorenson or BTMH is a "public figure" for purposes of their respective defamation claims. These issues will be discussed in turn.

THE NEW CLAIM FOR DEFAMATION

On June 30, 1986 Anne O'Neil testified, in response to questioning by Dr. Sorenson's co-counsel Robert E. Paarz, to a statement made to her by Dr. Nanavati. She testified that sometime in November, 1985 Dr. Nanavati referred to Dr. Sorenson as "a senile old doctor that had been there for

twenty years killing patients." (Transcript of June 30, 1986, p. 160, lines 14 and 15). This testimony was elicited in the following manner:

> Mr. Paarz: Other than making that statement to you or those statements you just told us about, was there anything else specifically that he mentioned that you can recall?
>
> Ms. O'Neil: Just, you know, the main thing was about Dr. Sorenson, you know, saying that he had been there for 20 years killing patients, he was a senile old doctor.
>
> Mr. Paarz: What was that?
>
> Ms. O'Neil: Senile old doctor that has been there for 20 years killing patients. That kind of upset me.

The next day Dr. Sorenson, by written motion, requested this Court to allow amendment of the pleadings to assert a new defamation claim against Dr. Nanavati based on Dr. Nanavati's remark to Anne O'Neil. In support of his motion, Dr. Sorenson relies on this Court's Opinion filed June 24, 1986.[1] Dr. Nanavati opposes the motion, claiming that such an amendment is improper under Fed.R.Civ.P. 15(d). He urges that Dr. Sorenson has not sustained his burden of establishing significant prejudice if the motion were denied. Dr. Nanavati argues that, on balance, he, not Dr. Sorenson, would be severely prejudiced by an adverse ruling.

We note at the outset that Dr. Sorenson's motion, which seeks to add a claim based upon events which occurred after the date of the pleading to be supplemented, falls within the purview of Fed.R.Civ.P. 15(d). Unlike Rules 15(a) and (b), however, Rule 15(d) does not so freely permit the amendment pleadings. It provides in relevant part:

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1. In that Opinion, we granted Dr. Nanavati's motion to amend the pleadings pursuant to Fed.R.Civ.P. 15, to include Burdette Tomlin Memorial Hospital and the Executive Committee of the Medical Staff as antitrust defendants because, *inter alia*, these parties had notice of the allegations, and thereby were not prejudiced by allowing the amendment.

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading to be supplemented.

Fed.R.Civ.P. 15(d). Nevertheless, it is within our discretion to either permit or deny such an amendment. *See Owens-Illinois Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1188-89 (3d Cir.1979); *Bates v. Western Electric*, 420 F.Supp. 521, 525 (E.D.Pa.1976).

In exercising our discretion, we are mindful of the possible prejudice which may accrue to each of the parties as a result of an adverse ruling. We find, however, that Dr. Nanavati's contentions of severe prejudice are without merit. He, through his counsel, cross-examined Ms. O'Neil at trial, at which time he had the opportunity to inquire into her possible bias or prejudice. Further, Dr. Nanavati had the opportunity during the past week (after Ms. O'Neil's testimony) to investigate Ms. O'Neil's background, evaluate her contention, and present appropriate rebuttal witnesses.

Ms. O'Neil, who was listed as a witness in the Joint Final Pretrial Order, was not a surprise witness, and the statement to which she testified arose out of the same basic set of circumstances which gave rise to this lawsuit. This "conflict" has lasted more than seven years. The time has come to put it to an end. We shall not require Dr. Sorenson to file a separate action in the state court in order to pursue this claim, but we shall grant Dr. Sorenson's motion to supplement his pleadings.

THE ACTIONABLE NATURE OF THE STATEMENTS

The defamation defendant, Dr. Nanavati, contends that none of the statements upon which the plaintiffs' defamation action is based are actionable because each statement is absolutely protected as an expression of opinion. He further argues that even if the statements are not absolutely protected, each is, by virtue of the context in which it was made, priv-

ileged by Dr. Nanavati's interest in and duty to protect his patients.

Three statements have been identified by the Hospital as bases for its defamation claim. These statements are: 1) an April 25, 1982 statement to Mrs. Lorenzo, a patient, that the Hospital was "too dirty," 2) a set of statements made to a newspaper reporter for the Atlantic City *Press* that "I was concerned about everyone's life after that . . . I saw that man (the patient's husband) and I had to cover up for this doctor (Sorenson). . . . The correct interpretation (of the EKG's) would have saved her life . . .," and 3) a June 14, 1982 statement within a letter to the Joint Commission on Accreditation of Hospitals (JCAH) requesting that the commission investigate "what I regard to be substandard practices occurring in the Cardiac Care Unit at [BTMH]." A fourth statement has been identified by Doctor Sorenson as a basis for his defamation action. This statement was the one allegedly made to a nurse, Ms. O'Neil, on November 1985, which we have just discussed.

Because there is no such thing as a false opinion, *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974), pure opinions, no matter how pernicious, are absolutely protected by the First Amendment. *Avins v. White*, 627 F.2d 637, 642 (3d Cir.) *cert. denied* 449 U.S. 982, 101 S.Ct. 398, 66 L.Ed.2d 244 (1980) (applying Delaware law); *Kotlikoff v. The Community News* 89 N.J. 62, 68-69, 444 A.2d 1086 (1982). *See also* Restatement (Second) of Torts § 566 (1977). The First Amendment does not, however, protect statements which, even if they appear to be opinion, are in reality assertions of fact. *See* Restatement (Second) of Torts at § 566; *Kotlikoff, supra,* at 69, 444 A.2d 1086. Thus, distinguishing between pure opinion and factual assertions is of obvious importance. The issue is one of law for the court, *Kotlikoff* at 67, 444 A.2d 1086, and has been squarely presented in this case.

Clear guidelines for discerning opinion from fact have not yet been established. *See Ollman v. Evans*, 750 F.2d 970, 977 (D.C.Cir. 1984) (describing the area as "largely uncharted

seas"). The emergent view seems to be that the courts should analyze the totality of the circumstances in which the statements were made to decide whether they merit absolute protection, but a review of the case law reveals that certain factors have been isolated which provide assistance in distinguishing opinion from factual assertion. These factors include: the ambiguousness of the specific language used, the verifiability of the statements, the full context of the publication which contains the challenged statements, and the setting in which the statements appear. *Ollmam, supra* at 979.

Our consideration of the totality of the circumstances in which the statements were made, in this case, leads us to conclude that the statement made to the JCAH, but only that statement, is a protected expression of pure opinion. In reaching our decision, we have attempted to assess the average reader's view of the statement, *see Ollman, supra,* at 979 n. 16, in an effort to discern whether the statements merely express a derogatory opinion, or if, in contrast, they are false imputations of fact. *See generally* W. Page Keeton, *Prosser and Keeton on Torts,* § 113A, pp. 813-15 (5th ed. 1984). We consider it important, in this regard, to assess whether a given statement provides the reader with, or reasonably assumes that the reader already knows, the factual bases for the statement, so that the reader has enough information to recognize the statement as opinion, *see* Restatement (Second) of Torts § 566 comment b (1977), and, potentially, to permit the reader to form his own opinion.

Before explaining our analysis with respect to each statement, we must note that we have felt constrained, in our determinations, not to give weight to considerations of the true motivations of the speaker. The First Amendment protects, absolutely, statements which are opinion. We shall not therefore attempt to evaluate either the reasonableness of such opinions, or the reasons for their expression. To do so would violate the speaker's First Amendment right of free expression.

The statement to Mrs. Lorenzo, which is capable of defamatory meaning, clearly implies the existence of un-

disclosed facts. The language has a commonly understood meaning, and neither the context of the publication nor the setting in which it was made would put the average reader or listener on notice that the statement is not protected opinion. Obviously, the statement to Ms. O'Neil was also not a protected opinion.

Similarly, the statements made to the newspaper reporter are not protected expressions of "pure" opinion. The statements do not disclose their factual bases and they are unambiguous in their meaning. In addition, nothing in the article, taken as a whole, can fairly be said to put the average reader on notice that the statements are mere opinion.

In contradistinction to the statements just discussed, the statements contained within the letter to the JCAH are pure opinion. Not only are these statements couched in "opinion" language, but they are explicitly based on facts which are disclosed. Obviously, the factual bases are disclosed in somewhat general form, but the letter itself encourages the reader to acquire specifics. As such, the full publication clearly suggests that the statements are opinion. Furthermore, the very nature of the subject matter—an interpretation of JCAH guidelines and their specific application to a given hospital situation—provides notice to the reader that the content is rife with subjectivity. Such statements are, obviously, difficult to verify, and would not be accepted as factual by the average reader. In short, it cannot be said that the average reader would view the statement as fact. Thus, as a matter of law, the statement contained in the letter to the JCAH is an expression of opinion and is not actionable.

Turning to the defamation defendant's claim that his statements were subject to a qualified privilege, we hold that the statements must still be submitted to the jury. A qualified privilege is lost if the statement to which the privilege attaches is motivated chiefly by ill will, *Coleman v. Newark Morning Ledger Co.*, 29 N.J. 357, 383, 149 A.2d 193 (1959), and a question exists in this case regarding Dr. Nanavati's actual motivation in making the statements at issue. Accord-

ingly, the jury will be allowed to consider these statements as potentially defamatory.

THE NEED TO PROVE SPECIAL DAMAGES

Dr. Nanavati argues that a corporation, not being a private person, can only recover for a defamation which caused it special damages. BTMH contends that a corporation need not prove special damages to recover under New Jersey law for alleged defamatory statements affecting it in its business. The general rule is that where a plaintiff's action is based on a defamation which adversely affects him in his business, such statement is a defamation *per se*, and plaintiff need not prove special damages. *See Mullenmeister v. Snap-On Tools Corp.*, 587 F.Supp. 868, 871 (S.D.N.Y. 1984) (New York law); *Zerpol Corp. v. DMP Corp.*, 561 F.Supp. 404, 409-10 (E.D. Pa.1983) (Pennsylvania law); Restatement (Second) of Torts § 573 (1982); W. Page Keeton, *Prosser and Keeton on Torts*, § 112, pp. 788, 790-92 (slander) and 795-96 (libel) (5th ed. 1984).

At the outset, we find that the statements upon which BTMH's claims are based are defamation *per se* because these statements, to the extent they are actionable, *see* discussion, *supra*, do adversely reflect upon BTMH in its business. Dr. Nanavati contends, however, that a corporation, unlike a natural person, must prove special damages even when the alleged defamation is defamation *per se*. We find his argument unconvincing. *See Zerpol*, 561 F.Supp. 404, 409-10 (E.D.Pa.1983) (under Pennsylvania law a corporation was not required to plead special damages where the defamation was actionable *per se*). In support of his contention Dr. Nanavati cites *Canino v. New York News, Inc.*, 475 A.2d 528 (N.J. 1984). The relevant passage is as follows:

> That libel *was* regarded as an injury to the person is shown in *Trenton Mut. Life & Fire Ins. Co. v. Perrine*, 23 N.J.L. 402 (Sup.Ct.1852), in which a corporation, not being a natural person, could recover only for a libel that caused it special damages. (emphasis supplied).

This passage, aside from being *dicta,* merely cites *Trenton Mutual* in a recitation of the history of defamation law in New Jersey, not necessarily as the present state of the law. Although neither the parties nor the Court have been able to locate any recent New Jersey case on point, we conclude that, despite the language used by the New Jersey Supreme Court in 1852 in *Trenton Mutual,* the New Jersey Supreme Court today would apply the hornbook rule, and not require a corporation to plead special damages where the alleged defamation constitutes defamation *per se.* Accordingly, BTMH need not prove special damages in support of its defamation claim against Dr. Nanavati.

THE LEGAL STATUS OF THE DEFAMATION PLAINTIFFS

Finally, we turn to the question whether either Dr. Sorenson or BTMH is a "public figure" for purposes of their defamation claims. A plaintiff in a defamation action, if found to be a "public figure," must prove an additional element in order to succeed on his claim—he must prove that the defendant made the alleged defamatory statements with actual malice. *See New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welsh, Inc.,* 418 U.S. 323, 347, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974). Dr. Nanavati argues that both Dr. Sorenson and BTMH are "public figures" within the meaning of the defamation laws. Dr. Sorenson and BTMH contend that they are not.

The United States Supreme Court, in *Gertz, supra,* identified two types of public figures. The first are those individuals who occupy positions of such pervasive power and influence or who achieve such pervasive fame or notoriety that they are deemed public figures for all purposes. 418 U.S. at 345, 351, 94 S.Ct. at 3009, 3012. The second are those "individual[s] [who] inject[ ] [themselves] or [are] drawn into particular public controvers[ies] and thereby become[ ] [ ] public figure[s] for a limited range of issues." *Id.* at 351, 94 S.Ct. at 3012. Apparently, it is this second test for public

figures which Dr. Nanavati urges applies to the defamation plaintiffs herein. The Third Circuit, in *Marcone v. Penthouse International Magazine for Men Ltd.*, 754 F.2d 1072 (3d Cir.) *cert. denied*, ____ U.S. ____, 106 S.Ct. 182, 88 L.Ed.2d 151 (1985), applied a two part test to determine whether the defamation plaintiff was a limited purpose public figure. First, the *Marcone* Court analyzed whether the alleged defamation concerned a "public controversy," as contrasted with a dispute of interest to the public. *Id.* at 1082. *See also Time, Inc. v. Firestone*, 424 U.S. 448, 458, 96 S.Ct. 958, 967, 47 L.Ed.2d 154 (1976). Second, it considered the nature and extent of plaintiff's participation in the controversy. *See Marcone*, 754 F.2d at 1082.

We entertain no doubt that the present case involves a public controversy. The challenged statements involve the reputation of a hospital and a doctor and their capacity to provide quality medical care to the people of Cape May County. We reject BTMH's assertion that this is a private matter, akin to divorce proceedings. All residents of the Southern New Jersey Area have a stake in the present controversy because all are potential patients at BTMH.

With respect to the second element of the *Marcone* test, however, we conclude that the nature and extent of the defamation plaintiffs' participation in the public controversy are insufficient to render either plaintiff a public figure. Dr. Sorenson has done little if anything to thrust himself into the public limelight on the issues in question, save from filing this defamation action. BTMH also has not injected itself into the controversy to an extent requiring us to label it a public figure. BTMH's involvement in the inhouse proceeding and the state court action against Dr. Nanavati are insufficient to render it a public figure in connection with its dispute with Dr. Nanavati.

BTMH does not attain the status of a "public figure" merely because it attempted to terminate, for whatever reason, the hospital privileges of a doctor. Nor should it be deemed a public figure because it defended its interests in the courts. *See Levine v. CMP Publications, Inc.*, 738 F.2d 660, 671-672 (5th Cir.1984). It is important to note that the defa-

mation plaintiffs herein did not voluntarily bring this dispute into the public forum. It was Dr. Nanavati who gave notoriety to the goings-on at the Hospital. It was he who filed, on two occasions, charges before the Equal Employment Opportunity Commission, and who brought the state court actions before Judge Rimm and Judge Gibson. Further, it was Dr. Nanavati, not BTMH or Dr. Sorenson, who gave numerous interviews to the press regarding the controversies at issue. We do not question Dr. Nanavati's legal right to take these steps, but merely suggest that it was these activities of Dr. Nanavati which gave rise to the defamation plaintiffs' participation, albeit limited, in a public controversy.[2] The extent of the defamation plaintiffs' participation in the controversy at issue mitigates against labeling them public figures. We hold that neither BTMH nor Dr. Sorenson shall not be considered a public figure for purposes of the defamation actions against Dr. Nanavati.

It is so Ordered.

APPENDIX C
NOT FOR PUBLICATION
Civil Action Nos. 83-0794, 84-1790.

OPINION
July 8, 1986.

COHEN, Senior District Judge:

The issue presently before the Court, which we shall call, in the interest of brevity, the "antitrust *per se* issue," presents yet another close question which has been hard fought by the parties. Reduced to its base, the issue is whether plaintiff Dr.

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2. It is, however, arguable that BTMH, in essence, advertised its services, either explicitly or implicitly, and therefore should be deemed a public figure only with respect to comment on its advertising. *See Steaks Unlimited, Inc. v. Deaver,* 623 F.2d 264, 272-73 (3d Cir.1980). However, in the absence of any proofs regarding BTMH's advertising, if any, we are unprepared to hold that they injected themselves into the public spotlight on the issue of patient care.

Nanavati is entitled to a jury charge which informs the jury that if a group boycott of Dr. Nanavati is found, then a *per se* antitrust violation has occurred.

Two tests have been developed for evaluating the activities of entities charged with antitrust violations. These tests are the "rule of reason" and the "*per se* rule." *See generally National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

In the ordinary case in which a violation of the antitrust laws is alleged, the finder of fact is called upon to analyze the activities complained of to determine whether they *unreasonably* restrain trade. This analysis, an application of the "rule of reason," seeks to evaluate the competitive significance of the alleged restraint, to discern whether the activities have anticompetitive effects which outweigh their potential procompetitive effects.

There are certain agreements to restrain trade, however, which, by virtue of their nature and necessary effect, are so plainly anticompetitive that no such evaluative weighing is required in order to establish their illegality. These agreements are, if proven, illegal *per se.* Concerted refusals to deal, or "group boycotts," are one type of such agreements. Accordingly, under ordinary circumstances, if the fact finder were to find that a group boycott occurred, the antitrust plaintiff would prevail.

A complication arises, however, when the antitrust defendants are members of a learned profession. Because the United States Supreme Court has cautioned that it would be unrealistic to automatically apply to the professions antitrust concepts which originated with respect to activities occurring in business, *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 788, n. 17, 95 S.Ct. 2004, 2013, n. 17, 44 L.Ed.2d 572 (1975), a series of cases have arisen which attempt to define a "learned profession exception" to the *per se* rule. The Third Circuit, in *Weiss v. York Hospital,* 745 F.2d 786 (3d Cir.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985), has recently addressed this exception and its application in some detail. In *Weiss,* an osteopathic physician who had been

denied staff privileges at the defendant hospital brought an action, individually and as a representative of the class of all osteopathic physicians in the area, alleging, *inter alia,* violations of the Sherman Act, 15 U.S.C: §§ 1 & 2. The Third Circuit, affirming in part and reversing in part the district court's entry of judgment on the jury's verdict in favor of the class, clearly expressed its view that the learned profession exception to the *per se* rule calls for the application of the rule of reason when, but apparently only when, the defendants offer a "public service or ethical norm" rationale for their challenged activities. *Weiss* at 821. Specifically, the *Weiss* Court suggested that an assertion that the antitrust plaintiff had displayed unprofessional conduct, including disruptiveness, would bring the rule of reason analysis to bear. *Id.* at n. 60. The *Weiss* Court, however, did not reach the issue whether the mere *assertion* of such a rationale would itself suffice to invoke the rule of reason analysis.

Because the defendants in this case have urged, as a defense, that the antitrust plaintiff's behavior was disruptive, we are forced to confront this issue. Upon reflection, we believe that allowing the mere assertion of such a defense to dispose of the *per se* rule would vitiate much of the substance of that rule. To assure that the advanced public service rationale is not merely pretext, we believe it is necessary to submit the issue to the jury. Specifically, we consider it appropriate in this case to instruct the jury that if they find that a group boycott occurred, they are to consider this a *per se* violation of the antitrust laws, *unless* they also find that the boycott was in fact motivated by a "public service" rationale. In the event that the jury finds a public service motivation for the group boycott, they will be instructed that they are to apply the rule of reason to evaluate the overall competitive significance of the activity.

ORDER

This matter having come before the Court on post-trial motions by plaintiff/counterclaim—defendant, Suketu H.

Nanavati, M.D. for a judgment notwithstanding the verdict ("j.n.o.v.") pursuant to Fed.R.Civ.P. 50(b), and, in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59(a) and defendant/counterclaim—plaintiff, Burdette Tomlin Memorial Hospital, and defendant, the Executive Committee for a j.n.o.v. and, alternatively, for a new trial; and

For the reasons set forth in the Court's Opinion filed this day; and

For good cause shown;

It is on this 2nd day of October, 1986 ORDERED that the motion for j.n.o.v. and new trial made by Dr. Nanavati shall be DENIED, and the motion for j.n.o.v. by the Hospital and the Executive Committee shall be GRANTED.

It is further ORDERED that judgment previously entered in favor of Dr. Nanavati and against defendants, Burdette Tomlin Memorial Hospital and Executive Committee of the Medical Staff of Burdette Tomlin Memorial Hospital shall be vacated, and a Judgment of No Cause for Action shall be entered.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 86-5778 and 86-5819

SUKETU H. NANAVATI, M.D.,
Appellant in No. 86-5778

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL and
EXECUTIVE COMMITTEE OF THE MEDICAL STAFF
OF BURDETTE TOMLIN MEMORIAL HOSPITAL
and ROBERT J. SORENSEN,
Appellant in No. 86-5819

ROBERT J. SORENSEN, M.D.

v.

SUKETU H. NANAVATI, M.D.

(D.C. Civil Nos. 83-0794 & 84-1790)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF NEW JERSEY—CAMDEN
Present: HIGGINBOTHAM, BECKER, and HUNTER,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the _____ District of New Jersey—Camden and was argued by counsel July 13, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 2, 1986, be, and the same is hereby affirmed insofar as the denial of the new trial motion on Nanavati's 42 U.S.A. §1981 claim; affirmed insofar the judg-

ment n.o.v. on Nanavati's antitrust claims; affirmed insofar as the said District Court's determination that it had subject matter jurisdiction over the state law defamation and tortious interference with business claims but reverse the said judgment for Sorensen on both claims. It is further ordered that the cross-appeal on the Hospital, Executive Committee and Sorensen which was docketed at No. 86-5819 is dismissed. Costs taxed against the appellants in No. 86-5819 with respect to that appeal. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

August 24, 1988

Costs taxed in favor of Suketu H. Nanavati, M.D., Appellee in No. 86-5819 only as follows:

Total of Brief	$2,476.16
Total of Joint Appendix	$1,093.32
TOTAL	$3,569.48

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5778, 86-5819

SUKETU H. NANAVATI, M.D.,
Appellant in 86-5778

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL, and
EXECUTIVE COMMITTEE OF THE MEDICAL STAFF
OF BURDETTE TOMLIN MEMORIAL HOSPITAL
and ROBERT J. SORENSEN
Appellants in 86-5819

ROBERT J. SORENSEN, M.D.

v.

SUKETU H. NANAVATI, M.D.

(D.C. Civil Nos. 83-0794 & 84-1790)

SUR PETITION FOR PANEL REHEARING

Present: HIGGINBOTHAM, BECKER, and HUNTER,
Circuit Judges

The petition for rehearing filed by appellee Robert J. Sorensen, M.D., having been submitted to the judges who participated in the decision of this court and no judge who

concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

BY THE COURT:

_____

Circuit Judge

DATED: September 26, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5778, 86-5819

SUKETU H. NANAVATI, M.D.,
Appellant in 86-5778

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL, and
EXECUTIVE COMMITTEE OF THE MEDICAL STAFF
OF BURDETTE TOMLIN MEMORIAL HOSPITAL
and ROBERT J. SORENSEN
Appellants in 86-5819

ROBERT J. SORENSEN, M.D.

v.

SUKETU H. NANAVATI, M.D.

(D.C. Civil Nos. 83-0794 & 84-1790)

SUR PETITION FOR PANEL REHEARING
AND SUGGESTION FOR REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, COWEN, *Circuit Judges*, and HUNTER, *Senior Circuit Judge**

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*As to panel rehearing only.

The petition for rehearing filed by appellant Suketu H. Nanavati having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

_____

Circuit Judge

DATED: September 26, 1988

CARL J. VALORE
Certified by the Supreme Court of NJ
as a Certified Civil Trial Attorney
Suite 302, Commerce Building
1200 Atlantic Avenue
Atlantic City, New Jersey 08401
(609) 348-0588

Suketu H. Nanavati, M.D.	:	Superior Court of
Plaintiff,	:	New Jersey
	:	Chancery Division
	:	Cape May County
vs.	:	Docket No.
	:	C-1140-82
Burdette Tomlin Memorial Hospital, et al.,	:	CIVIL ACTION
	:	ORDER
Defendants.	:	

This matter having come before the Court by Eisenstat, Gabage & Berman, P.C. (Gerald M. Eisenstat, Esquire, appearing) and notice having been given to Carl J. Valore, Esquire, representing defendant, Burdette Tomlin Memorial Hospital, and the Court having considered the moving papers and good cause having been shown;

IT IS on this 15th day of November, 1988 ORDERED AND ADJUDGED that:

1. The Judgment dated March 14, 1985 is permanent; and that

2. The defendants, Burdette Tomlin Memorial Hospital are hereby permanently enjoined and restrained as follows:

A. From denying the plaintiff, Suketu H. Nanavati, M.D., admitting, treating and consulting privileges for patients seeking the plaintiff's services at Burdette Tomlin Memorial Hospital.

B. From revoking, suspending or restraining the plaintiff, Suketu H. Nanavati, M.D., from full staff privileges and are specifically ORDERED to reinstate the plaintiff, Suketu H.

Nanavati, M.D. to said full staff privileges, except as may hereafter be permitted in the event of a violation of the by-laws of defendants and in accordance with said by-laws.

C. From instructing its personnel to refuse to call, contact or otherwise engage the services of the plaintiff, Suketu H. Nanavati, M.D., when requested to do so by persons presenting themselves for admission to or arriving for emergency treatment at the defendant, Burdette Tomlin Memorial Hospital.

D. From hindering or interfering with the plaintiff, Suketu H. Nanavati, M.D., in his exercise of staff, admitting, treating and consulting privileges and are hereby ORDERED to provide him with all customary assistance in the performance of his medical duties and activities as are generally provided to staff physicians.

_____

MARVIN N. RIMM, J.T.C., t/a

I hereby consent to the entry of the
above Order:

EISENSTAT, GABAGE & BERMAN
A Professional Corporation
Attorneys for Plaintiff

By _____
GERALD M. EISENSTAT

_____

CARL J. VALORE
Attorney for Defendant, BTMH

* * * * *

Trial Transcript, May 20, 1986: Mr. Mullin
Page 119, line 17 to page 120, line 2

Q. Mr. Mullin, if I understand your direct testimony, nurses told you that Dr. Nanavati wasn't caught up on his paperwork and that's why you couldn't see him, is that right?

A. Yes.

Q. I would like you to go back in time and try and remember exactly what those nurses said. Did they say he hadn't completed medical charts?

A. No. They just said paperwork and I got that from three different nurses.

* * * * *

Trial Transcript, May 28, 1986: Mr. Waldron
Page 5, lines 16-25

Q. Mr. Waldron, I asked you yesterday if you could check for me on the Florence Bedell matter in which she came to the emergency room I believe in April of this year. You thought that Dr. Nanavati may have been on suspension because of not having his charts up to date. Were you able to check on that?

A. Yes.

Q. On the date she came in, was Dr. Nanavati on suspension?

A. No, he wasn't. He had been previously.

* * * * *

Page 85, lines 7-10

Q. So there's a set fee for each EKG?

A. Yes, there is.

Q. How much is that?

A. $5.

* * * * *

Trial Transcript, June 9, 1986: Dr. DiRago
Page 6, lines 4-14

Q. IS THERE AN EFFORT MADE AS A ROUTINE MATTER TO YOUR KNOWLEDGE AT BURDETTE TOMLIN IN THE EMERGENCY ROOM TO DETERMINE WHO THE PATIENT MAY BE SEEING EITHER AS A FAMILY PHYSICIAN OR AS A SPECIALIST OTHER THAN WITH REGARD TO WHY HE IS NOW IN THE HOSPITAL IN THE EMERGENCY ROOM?

A. YES. NOT ONLY THERE BUT PROBABLY EVERY OTHER EMERGENCY ROOM REQUIRES THAT POLICY.

Q. AND IS AN EFFORT MADE TO CONTACT THE PHYSICIAN WHO HAD BEEN TREATING THE PATIENT?

A. YES, STANDARD PROTOCOL.

* * * * *

Page 9, lines 15-24

Q. DID YOU HAVE ANY CONVERSATION AFTER THAT ABOUT YOUR ADMISSIONS OF THESE PATIENTS WITH THESE THREE DOCTORS?

A. YES, SIR. SHORTLY THEREAFTER, DR. SORENSEN CALLED ME AND ASKED ME WHAT I DID WITH THESE PATIENTS. AND HE MADE A STATEMENT TO ME WHICH I'LL RELATE NOW. "WHY DIDN'T YOU KEEP IT IN THE FAMILY?" FIRST STATEMENT. AND, THEREAFTER, "WHY DID YOU CALL NANAVATI?" AND THAT WAS THE END OF THAT PARTICULAR CONVERSATION.

* * * * *

Trial Transcript, June 10, 1986: Dr. Nanavati
Page 9, line 23 to page 10, line 4

Q. I'M TALKING, SIR, ANY TIME UP UNTIL TODAY FROM THE DAY YOU FIRST MET HIM, DID DR. SORENSEN EVER SAY I WILL NOT PERMIT YOU TO READ EKG'S?

A. ONLY THE TIME ON NOVEMBER 12, 1982 WHEN I WAS DISMISSED AND SATURDAY WAS MY DAY. I WENT TO READ IT AND HE SAID YOU CAN'T READ IT.

* * * * *

Page 192, line 18 to page 193, line 1

Q. DOCTOR NANAVATI. THE—IN RELATION TO THE ACTIONS BY THE HOSPITAL THAT YOU HAVE TESTIFIED ABOUT, INCLUDING THE ACTIONS BY THE HOSPITAL IN NOVEMBER 1982 TO TAKE AWAY YOUR STAFF PRIVILEGES AND THE VARIOUS TIMES YOU WENT TO STATE COURT, ENDING UP WITH JUDGE RIMM'S DECISION, YOU HAVE TESTIFIED THAT YOU RETAINED COUNSEL: IS THAT CORRECT?

A. YES, SIR.

* * * * *

Trial Transcript, June 13, 1986: Dr. Nanavati
Page 6, lines 12-14

Q. I BELIEVE YOU HAD MR. EISENSTAT REPRESENTING YOU IN SOME MATTER. WHAT IS HIS HOURLY RATE?

A. A HUNDRED 25 DOLLARS PER HOUR.

* * * * *

Trial Transcript, July 9, 1986: Dr. Volpi
Page 107, line 4 to page 108 line 14

Q. And then at some point the patient is transferred to the care of another physician; is that correct?

A. Yes, it is.

Q. And on occasion did you have the opportunity to refer patients to certain doctors?

A. Yes, I did.

Q. And did you, in fact, do it?

A. Yes, I did.

Q. Did you ever refer any patients to Dr. Nanavati?

A. Yes, I did.

Q. And were those patients who had cardiac problems?

A. Yes.

Q. And let me direct your attention to in or about August of 1983. Did you have a conversation with Dr. Engstrom about your referral of cases to Dr. Nanavati?

A. Yes, I did.

MR. PAARZ: Objection, your Honor. Dr. Engstrom is not an agent of the hospital, is not an employee of the hospital, not authorized to make any statements that may bind the hospital; therefore, anything Dr. Engstrom would say would be inadmissible.

THE COURT: The objection will be sustained.

BY MR. LYTTON:

Q. As a result of this conversation with Dr. Engstrom, did you change your referral patterns to Dr. Nanavati?

A. Yes, I did.

Q. What did you do?

A. I decreased the amount of patients I referred to him.

* * * * *

Page 128, lines 15-24

Q. So that over a period of six months there was a time when you were making referrals to Dr. Nanavati, and then sometime after that you decreased the number of referrals, continued to make them but can't tell us the difference; is that what your testimony is?

A. Well, I decreased my referrals for a very short period of time. Then I realized that patient care was compromised so much that I started doing referrals to himself.

* * * * *

Page 131, lines 4-17

Q. Well, you've identified Weiner, Sorensen and Nanavati and sometimes Komansky as the four people who would get

referrals for heart patients. Those four doctors were receiving your referrals before this conversation, correct?

A. Yes.

Q. After this conversation, correct?

A. Yes.

Q. And after you had gone back up from the reduced level, the same four doctors got the referrals, correct?

A. Yes.

Q. So nothing really changed, did it?

A. Yes. A big thing changed.

* * * * *

Page 148, lines 21-25

Q. Now, when you're talking about the fact that you decreased referrals to Dr. Nanavati, you're talking about referrals of patients who didn't indicate any doctor; is that correct?

A. Yes, that's correct.

* * * * *

Page 161, line 15 to page 162, line 4

Q. Now, in response to a question by Mr. Paarz about the—you testified your referral patterns changed and then he then said, "Well, nothing changed," and you said, "Yes, a big thing changed." He didn't ask you what that was.

What did you mean by that?

A. That when I had to stop or decrease my—when we use the word referrals, it's really not referrals; it's really a suggestion, because I didn't have the power to refer, just the power to suggest as a person. When I had to stop suggesting who I felt was the best cardiologist, then I felt—which is one of the reasons I left that institution—that the quality was down, was poor.

* * * * *

Page 171, line 11 to page 173, line 20

Q. The six months you were there, this power structure which allegedly is Mr. Gould and myself and Mr. Waldron and Dr. Sorensen, Dr. Brown, now we're hearing about Dr. MacDonald, he's being brought in here, too, I guess, all these people that are being mentioned as a power structure at the hospital who crushed the little guy, who in the six months that you were there did we crush?

A. Well, the fear, the atmosphere and the fear in the emergency room there amongst the nursing staff and several of the physicians were such that there was a very thin line. And if someone crossed it, they were going to lose their job. Did anyone lose their job, I have no idea.

Q. So you don't know of anyone who lost their job?

A. No, I don't.

Q. But you're saying the people in the emergency room were bound together by some kind of nameless fear?

A. I don't think it was really nameless.

Q. Well, what was it? We want to know who it was. Who was terrorizing them?

A. It was administration, it was one head nurse or charge

nurse that I remember, who, on several occasions, would make comments and the nurses would actually be fearful of them.

Q. Okay. Well, this is a charge nurse in the emergency room?

A. Yes, or—yes—not in the emergency room. She was a charge in the hospital.

Q. So, in other words, some charge nurse would say something who would put people who were under her in fear of their job?

A. Head nurse. I don't know if charge nurse is the right word. Supervisor, I guess, is the right word.

Q. Did this have anything to do with racial discrimination, this fear?

A. Well, the fear was that, when I worked in the hsopital, there was nurses that felt the same way I did, that the care by Dr. Nanavati was such that should be given to the patients; and if the nurses were caught suggesting that he was a better doctor, just as I was, that they were in jeopardy of losing their job.

Q. Okay, good. So we got it out of the closet. What you're saying is that you and nurses and other people were in fear that if you suggested Dr. Nanavati to the patients, over other doctors, you would lose your job?

A. Yes.

Q. And you felt that as a hospital employee or as an employee of this emergency room group you were in—the nurses were hospital employees—that they should be able to suggest a physician to a patient; is that what you're saying?

A. Yes.

* * * * *

Page 175, lines 4-11

Q. How do you know it wasn't? You were there for six months, weren't you?

A. Yes. Because I knew it wasn't because I sat in this little room and sat with all of the doctors who sit around and talk a

lot, and I knew that there was a group of physicians that it was their prime goal to get rid of one physician who I thought was the best physician there, and I knew that's what was going on.

* * * * *

Page 178, line 24 to Page 179, line 12

Q. Doctor, Mr Valore asked you, he said that you were in fear that if you referred patients to Dr. Nanavati, you would lose you job. Why? What was it that was the basis for that fear?

A. That I would have disregarded something that was told to me by my boss.

Q. Now, second thing Mr. Fitzpatrick asked you, you testified that on frequent occasions you were in the ER and you were aware that a group of physicians were trying to get rid of one physician. Who was the one physician that you were aware they were trying to get rid of?

A. Dr. Nanavati.

* * * * *

Trial Transcript, June 3, 1986 (a.m.): Dr. Nanavati
Page 81, lines 7 to 19

Q. When was it that you were—that you lost for the first time your staff privileges at the hospital? November of 1982?

A. Yes, if I remember, it was Friday.

Q. I believe it was November 12, 1982.

Now, did you and your lawyer then go to the Superior Court of New Jersey at that time, or a couple of days later?

A. Yes.

Q. And on November 17, was an order entered by the judge in that case restraining the hospital from taking away your staff privileges?

A. That is correct.

EXHIBIT
2139g

Summary of Special Damages

Legal Fees Paid	$ 39,384.00
Current Loss (Actual) from Inpatient Referrals	$ 137,088.00
Future Loss from Inpatient Referrals	$1,028,800.00
Lost Echocardiogram Tests	$ 139,300.00
Lost Inpatient Stress Tests	$ 59,520.00
TOTAL	$1,404,092.00

Summary Assuming 30% Growth Rate

Legal Fees Paid	$ 39,384.00
Current Loss (Projected) from Inpatient Referrals	$ 491,040.00
Future Loss from Inpatient Referrals	$1,028,800.00
Lost Echocardiogram Tests	$ 139,300.00
Lost Inpatient Stress Tests	$ 59,520.00
TOTAL	$1,758,044.00

(3)

No. 88-1068

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In The

Supreme Court of the United States

October Term, 1988

SUKETU H. NANAVATI, M.D.,

Petitioner,

vs.

BURDETTE TOMLIN MEMORIAL HOSPITAL and EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE BURDETTE TOMLIN MEMORIAL HOSPITAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW - RESTATED

1. Is the abuse of discretion by the trial court in granting a mid-trial amendment permitting Petitioner to name the Executive Committee and Hospital as Sherman Act § 1 defendants an appropriate topic of Supreme Court review?

2. Does the decision of *American Society of Mechanical Engineers v. Hydrolevel Corp.* compel reversal of the Third Circuit's affirmance of the judgment notwithstanding the verdict where the only alleged conspirators (never identified below) had neither economic motivation nor standing separate and distinct from either the Hospital or the Executive Committee so as to meet the multiplicity requirement of a Sherman Act § 1 claim?

3. Does the decision of *Continental Ore Co. v. Union Carbide Corp.* compel reversal of the Third Circuit's affirmance of the judgment notwithstanding the verdict where Petitioner failed to present a Sherman Act claim to the jury premised upon the Komansky contract for the provision of echocardiograms and stress test services and where Petitioner failed to allege or prove the necessary elements of either an illegal exclusive dealing or tying arrangement?

4. Is Petitioner entitled to an award of nominal damages and counsel fees where he failed to request nominal damages at trial, failed to prove any illegal anti-trust motivation on the part of the Executive Committee and/or the Hospital, failed to prove that any one possessed of anti-trust motivation had acted with or on behalf of the Executive Committee and/or the Hospital, failed to prove the relevant product and geographic markets and failed to prove damages?

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No. 88-1068

In The

Supreme Court of the United States

October Term, 1988

SUKETU H. NANAVATI, M.D.,

Petitioner,

vs.

BURDETTE TOMLIN MEMORIAL HOSPITAL and EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE BURDETTE TOMLIN MEMORIAL HOSPITAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT OF THE CASE

The removal of Dr. Nanavati from the Medical Staff the Burdette Tomlin Memorial Hospital (hereinafter "Hospital") came as the result of fifteen separate charges and specifications focused,

principally, upon his disruptiveness. This was characterized by repeated failures to observe Hospital admission practices, Hospital rules in general and expected norms of ethical conduct both towards patients and the nursing staff (2057a-2059a) as well as efforts to supplant Dr. Robert Sorensen as the Chief of the Cardiology Department, highlighted by continued attacks on Sorensen's competence. With specific reference to the charges against Dr. Nanavati, the New Jersey Superior Court citing the Appellate Division below stated:

> unfair criticism tending to break down nursing staff morale and discipline, inquiry to a patient as to why she had chosen another doctor and preemption of hospital beds contrary to admissions policy were among defendant hospital's charges against plaintiff. In our view, none of the foregoing charges, as examples of the fifteen charges against plaintiff, were petty personality grievances or inadmissible against plaintiff in hospital disciplinary proceedings until proof of actual adverse effect on patient care.

Nanavati v. Burdette Tomlin Memorial Hospital, 107 N.J. 240, 247 (1987).

Nanavati's conduct was accurately perceived as having personal economic aggrandizement as its source:

> Dr. Nanavati had engaged in continuous course of conduct which was totally disruptive of hospital routine which conduct was motived by economic purposes.

(2016a).

In essence, Nanavati, angered by Dr. Sorensen's failure to

instantaneously, upon Nanavati's arrival at the Hospital, provide him with days to read EKG's, set about undermining Dr. Sorensen's reputation for competence. In a meeting of the assembled Medical Staff on April 3, 1979 (approximately 4 weeks after his arrival at the Hospital) Nanavati rose and labeled Dr. Sorensen an "inferiorly qualified" physician in an unabashed effort to wrest the exclusive right to read EKG's from him.

Moreover, Nanavati's subsequent and widely disseminated claims that the only member of the Medical Staff whose practice was in competition with that of his own, Dr. Sorensen, was committing medical malpractice and even killing patients, were never proven. Rather, such claims were rejected by the jury which found them actionable in the aggregate amount of $1,150,000 — against him.[1] Not so mysteriously, when the Executive Committee intervened and requested of Dr. Sorensen (ultimately successfully) that EKG days be accorded Nanavati, his first wave of attacks on Dr. Sorensen abated.

No element of the "taint" in the deliberative processes of either the Medical Staff or Board of Governors in their determination to remove Nanavati from the Medical Staff and resulting in the trial court's collateral estoppel finding was based upon economic motivation. In this regard, and contrary to Nanavati's current assertion that "there existed no legitimate explanation for the Hospital's conduct" (Petition p. 13), the jury expressly found as a fact (determined to be a "supported finding" by the Third Circuit; A44) that the conduct directed toward Nanavati was premised upon his own "unprofessional behavior or violations of public service or other ethical norms." (A82).

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1. The Third Circuit ultimately reversed this judgment on the ground that Nanavati's oral statements constituted protected opinion inasmuch as they had been uttered to newspaper reporters steeped in the lengthy personal feud between Drs. Sorensen and Nanavati (A11-A21).

No proof was introduced from any of the witness/patients or ER physicians called by Nanavati to corroborate his present ER "boycott" theory that the source of such interference came from anyone other than Dr. Sorensen — the individual wholly exonerated by the jury and whose continued involvement has been expressly foreclosed by Petitioner pursuant to R. 19.6. Similarly, Nanavati introduced no proof that the Hospital, ER nurses or physicians had any interest at economic odds with him. Yet, Nanavati maintains that the Hospital "acted in furtherance of unlawful conduct of others." (Petition p. 13). This is allegation, nothing more.

Nanavati contends that the Hospital "sought out" Dr. Komansky in 1983 to solicit the ultimate August 1983 execution of the contract on the part of the Komansky Professional Association (hereinafter "Komansky Contract") to read echocardiograms and stress tests[2] and in so doing authorized "monopoly prices" for "inferior service." (Petition p. 12). Here again the trial record fails to support Nanavati's assertions.

Komansky initiated the contact by inquiring about the placement of his stress test lab in the Hospital (Trial Tr., 6/30/86, 105:16-25). Upon examination it was revealed that Nanavati actually charged $400 for these tests in his office and that his "bargain basement" $100/test price was premised upon the

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2. Nanavati ignores the fact that by August 1983, the date of the Komansky Contract, he had filed two EEOC complaints alleging disparate treatment on the basis of race and national origin (claims rejected by the jury) and one lawsuit each in state and federal forums naming the Hospital as defendant. Nanavati further forgets that he personally withdrew a previously included request to perform echocardiograms and stress tests from his application for renewed privileges which covered the period of the exclusive contract at issue (7010a-7011a). Moreover, he failed to object to that portion of the jury charge which stated that the Hospital was not obligated to put the contract out for bid (Trial Tr., 7/15/86, 46:18-24).

Hospital supplying and maintaining the equipment and providing a techinician, medical malpractice coverage and the like (Trial Tr., 6/5/86, 49:2-10). There is no proof that the Komansky group provided "inferior service." (Trial Tr., 6/5/86, 44:7-45:7). The record is void of proof that Nanavati would provide the same or superior service as Komansky for less, and there was no proof regarding the actual market price for echocardiograms and stress tests, a necessary predicate to the labelling of the Contract as monopolistic.

Similarly there is no proof that the Hospital had any degree of "market power" in the provision of in-patient cardiac care with respect to patients who required echocardiograms or stress tests. Rather, the testimony at trial, which was undisputed and voluminous, was that the Hospital had no special province over the provision of cardiac care ("special and superior" brand practiced by Nanavati or any other form) to any collection of individuals within any specific geographic confine. Physicians at the Hospital referred patients to cardiologists other than Dr. Sorensen who were outside of the immediate area of the Hospital. For example, Dr. Gelzunas referred to Drs. Robert and Michael Katz in Somers Point and Drs. Ziccardi and Datesman in Atlantic City (7000a). Even Nanavati testified that specialty cardiac care patients from the immediate area chose to be treated other than at the Hospital.

> Q. Do you know anybody else who treated cardiology patients?
>
> A. People used to go to Philadelphia, Shore Memorial (in Somers Point), Northfield.

(7001a).

Moreover, Nanavati ignores the fact that on the one occasion

when he requested use of the Hospital echocardiogram machine, he was permitted (7003a). As the Komansky Contract makes clear, the Hospital charged *only* for its own expenses/services. Physician/professional services were billed independently and directly by the physician to the patient on a "fee for service basis." (3128a). The Hospital was not, by definition, a competitor in the field of the "exclusive" service provided by Komansky's group. Finally, there is no proof that Nanavati could not or did not market his services as an echocardiogram and stress test reader elsewhere — *i.e.*, in the context of a nationwide market.

From a procedural standpoint, the Executive Committee and Hospital should never have been required to defend a Sherman Act § 1 claim. On November 17, 1982, prior to the filing of the federal court action, Nanavati filed a state court action seeking an injunction reinstating him to the Medical Staff. He failed at that time to set forth either an anti-trust, § 1981, or a 42 U.S.C. § 2000(e) claim despite the then existence of all facts subsequently relied upon by him in the filing of the instant federal action. The original federal complaint, Civil Action No. 83-0794, was filed by Nanavati on March 8, 1983 and asserted in Count I, liability, only as to the Hospital and Executive Committee, for violation of 42 U.S.C § 1981 and § 2000(e), *et seq.* (Title VII). In Count II, brought only against Dr. Sorensen, Nanavati asserted common law liability for interference with business and defamation.[3]

On May 10, 1984, Dr. Sorensen filed a three count complaint, Civil Action No. 84-1790, against Nanavati. Count I asserted a claim for "restraint of trade." Count II asserted damages for slander and Count III claimed damages for interference with business, based upon slander. Nanavati, in his counterclaim

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3. All of these claims were either dismissed as a matter of law during trial (Title VII) or "no caused" by the jury. Nanavati's defamation claim was dropped at the final pre-trial conference on May 12, 1988.

thereto, reflexively sued Dr. Sorensen *only* in "restrain [of] trade" without specification as to the statutory basis, legal theories involved or the "conspirators" implicated.

Neither Nanavati nor Dr. Sorensen (and, obviously, neither the Hospital nor the Executive Committee) obtained, pre-trial, the services of an expert in medical/population demographics. No written discovery was propounded upon Nanavati by the Hospital or Executive Committee to elicit the identity of the conspirators, their intent, or the effected product and geographic market as, prior to trial, there was no need.[4] The trial court permitted Nanavati during the sixth week of a nine week trial (and subsequent to defendant's motions for directed verdict) to, in essence, amend his counterclaim in C.A. No. 84-1790 to add the Executive Committee and Hospital as the Section 1 defendant, co-conspirators of Dr. Sorensen. The legal maelstrom that followed, as reflected in the Third Circuit's opinion, has resulted in a jumbled factual and procedural morass, only a portion of which is now before this Court. While this case was indeed rife with issues prior to their resolution by the Third Circuit, that Court's holding failed to exhibit conflict with those Supreme Court rulings now cited by Nanavati. Moreover, the issues embodied therein fail to raise "important question(s) of federal law," a prerequisite for the discretionary grant of a Petition for Writ of Certiorari. Rule 17.1(c).

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4. Had Nanavati proven Dr. Sorensen as the sole competitor and "ringleader", as alleged in his pre-trial, he need not have sought the mid-trial amendment inasmuch as his right of recovery under the Sherman Act was deemed joint and several. *Uranium Anti-Trust Litigation,* 617 F.2d 1248 (7th Cir. 1980). Moreover, there would have existed no right of contribution by Sorensen even from proven co-conspirators, unnamed as defendants. *Texas Industries, Inc. v. Radcliffe Materials,* 451 U.S. 630 (1981). Thus, Nanavati could have recovered his anti-trust damages (if any) from Dr. Sorensen alone and the Executive Committee and Hospital would have been immune from Sherman Act liability prior to the amendment.

REASONS FOR DENYING THE WRIT

I.

The abuse of discretion by the trial court in granting the mid-trial amendment adding anti-trust claims against the Executive Committee and Hospital is not an appropriate topic of Supreme Court review on certiorari.[5]

Anti-trust issues of substance cannot be resolved adverse to Respondents (and therefore those questions raised in the petition even addressed) unless and until Nanavati's mid-trial amendment, ensnaring the Executive Committee and Hospital in his ever-changing[6] net of anti-trust conspiracy, is found not be an abuse of discretion by the trial court. Clearly, such a fact specific issue does not comport with the requirements of Rule 17.1(c). The law in this regard is not in need of further explication. *See Foman v. Davis,* 371 U.S. 178 (1962).

Below Nanavati neglected to explain why he waited until the sixth week of the nine week trial, after the close of his proofs, to seek the amendment but for which no verdict would have been obtained in his favor. In *Adams v. Gould, Inc.,* 739 F.2d 858, 868 (3rd Cir. 1984), *cert. denied,* 469 U.S. 1122 (1985), the Third Circuit recognized the importance of determining a party's motive

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5. Neither the trial court in the context of post-trial motions nor the Third Circuit dealt with the merits of this ruling.

6. In his actual pleadings, Nanavati named only Dr. Sorensen as the individual who restrained his trade — a clearly non-actionable allegation under § 1 in the absence of other actors. In his pre-trial, *as amended,* Nanavati named Dr. Sorensen, the Executive Committee and the Hospital as the co-conspirators. On appeal, his web of intrigue has seemed to have expanded to virtually anyone who did not like him and/or felt he over-medicated and over-billed patients (*e.g.,* Drs. Renza and Haflin).

in delaying an amendment, stating:

> The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point the delay will become "undue" placing an unwarranted burden on the court, or will become "prejudical" placing an unfair burden on the opposing party.

The questions of undue delay and bad faith require a focus on Nanavati's motive(s) for not amending his complaint earlier. Nanavati has been, at all times, alarmingly silent as to why it took him three years of litigation and six weeks of actual trial to "remember" to amend his pleadings to include the Executive Committee and the Hospital as § 1 defendants (Trial Tr., 8/14/86, 109:11-25--110:1-18). Obviously, the application to amend came at the point in trial when Nanavati realized that his conspiracy claim, with Dr. Sorensen at its hub, was not being believed by the jury. His realization proved accurate.

Nanavati's representation that "experienced" anti-trust counsel became involved in this matter only after the pleadings were "closed" is unpersuasive, as present counsel became involved in *August of 1985* and no mention of an intent to amend was ever made until *after* Nanavati rested eleven months later. "When there has been a lack of diligence, the burden shifts to the movant to prove that the delay was to due to excusable neglect." *Chitamacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983) (*cited with approval in Adams v. Gould Inc.*, 739 F.2d at 868). Nanavati has failed to respond in the face of this burden. *See Serrano Medina v. United States*, 709 F.2d 104, 106 (1st Cir. 1983); *Mende v. Dunn & Bradstreet Inc.*, 670 F.2d 129 (9th Cir. 1982); *DeBry v. Trans America Corp.*, 60 F.2d 4801 (10th Cir. 1979); *Deakyne v. Commissioners of Lewes*, 416 F.2d 290 (3rd Cir. 1969). Nanavati

implicitly contends that the Respondents were in no need of discovery or expert testimony with respect to the Sherman Act claims brought against them. In argument to the Third Circuit Nanavati relied upon statistics collected by the Hospital indicating what percentage of patients came from Cape May County as proof of an element of his Sherman Act claims: *i.e.*, geographic market area. Nanavati's conclusion as to the legal significance of those statistics is undeniable proof of the high degree of prejudice suffered by Respondents as a result of the amendment. The answer to the question, what percentage of the Hospital patients come from Cape May County, is not proof of geographic market, as claimed by Nanavati. Rather, the answer to the question, what percentage of the total potential cardiac care patients in the patient base Cape May County (or whatever an appropriate geographic confine would be) actually go *to the Hospital* by virtue of its "market power" instead of elsewhere, is the appropriate anti-trust inquiry. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2 (1984); *Weiss v. York Hospital,* 745 F.2d 788 (3rd Cir. 1984), *cert. denied,* 470 U.S. 1060 (1985). On this point, the record is silent. Moreover, Respondents were totally deprived of the opportunity to conduct an appropriate demographic study to ascertain where Cape May County cardiac patients actually go for such specialty care and to place that geographic market analysis before the jury in the form of appropriate lay and expert testimony. Thus, while Nanavati's § 1 case contained no new facts (how could it, given that Nanavati had rested when he moved to amend) the newly named § 1 Respondents *should have* been given the opportunity to gather relevant facts and prepare all attendant legal issues necessary to their defense in advance of trial.

In essence, the trial court's ruling permitting the belated amendment would place *all* defendants in *all* matters on notice that they are under an affirmative obligation to devine and fully prepare (including preparation of anticipated discovery and expert's reports) for each and every claim of any nature arguably

implicated by the facts of a plaintiff's case, whether such claims are or are not pled. This is contrary to the rule of *Foman*, 371 U.S. 178. Moreover, such a finding condones "trial by ambush" and renders meaningless the discovery provisions of the Federal Rules. The ultimate irony, of course, is Nanavati's strategy to "amend in" such complex claims *during trial* (despite his counsel's representations that the very same amendment *could not* have been made in August of *1985* because Magistrate Simandle had, by order, "closed" the pleadings) so as to set up Respondents to a claim that they waived objections to the admitted deficiencies in his case.

The Third Circuit, in evident recognition of the inherent unfairness to Respondents, nonetheless addressed the full compliment of substantive flaws raised by defendants, as it was empowered to do. *See Palmiero v. Spada Distributing Co.*, 217 F.2d 581 (9th Cir. 1951); *U.S. Industries Inc. v. Semco Manufacturing Inc.*, 562 F.2d 1061 (8th Cir. 1977), *cert. denied*, 434 U.S. 986 (1978); *Miller v. Premier, Inc.*, 608 F.2d 973 (4th Cir. 1979); *Camillo v. Sameit Westbulk*, 514 F.2d 1214 (1st Cir. 1975), *cert. denied*, 423 U.S. 1014 (1975); *O'Brien v. Willy's Motors Inc.*, 385 F.2d 163 (5th Cir. 1967).[7] Moreover, special verdicts, such as the one in this case, are governed by Rule 49(a), which does not require objections before discharge of the jury. *See, e.g., Malley-Duff Assoc. Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 144-145 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1072.

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7. Finally, in this regard, is Nanavati's violation of the Rule against issue splitting by failing to have incorporated in the state court action all then existing claims subsequently set forth herein. Had the trial court properly granted Respondents' pre-trial motion on this basis, they would not have been the unwitting recipients of the mid-trial amendment.

II.

This Court's decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.* is not in conflict with the opinion below.

Nanavati now endeavors to lift an abstract rule out of *American Society,* factually wed to the unique circumstances therein, and apply it to this action without regard to the rationale behind the Third Circuit's holding in affirming the judgment notwithstanding the verdict. Briefly, in *American Society,*[8] Hydrolevel successfully entered the low water fuel cut-off market and, in so doing, secured an important former customer of McDonnell & Miller ("M&M"). In both retaliation and an admitted effort to undermine Hydrolevel's image and standing in the market, M&M employees conspired with representatives of defendant, ASME (themselves financially involved with an entity in the process of negotiating the purchase of M&M), for the express purpose of drafting a position paper criticizing the safety of the Hydrolevel low water fuel cut-off device. This document, having been conjured so as to undercut Hydrolevel's market share, was subsequently distributed by M&M salesmen to the public resulting in the desired effect. Thus, the solitary issue before the *American Society* Court was whether the non-profit membership corporation itself could be liable where its agents, acting within their apparent authority, sought to use the corporate entity as the device to further their individualized, conspiratorial and admittedly anti-competitive ends.

No proof exists in the record below to render the *American Society* rule applicable herein inasmuch as neither the nurses or

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8. Of no small consequence was the failure of Nanavati to rely upon either *American Society or Continental Ore,* (Point III, *infra*) in his argument and Brief to the Third Circuit.

ER physicians referred to by Nanavati in his Petition as having carried out the "boycott" had any proven (or even alleged) anti-competitive or economic based motivation to conspire with anyone. Nor does proof exist that the Hospital, which quite naturally (albeit nonprofit), derives income from the work of its physicians on staff, had any such motive. To improperly direct the flow of ER patients from Nanavati to anyone else would fail to enhance the Hospital's economic ends. Moreover, the record is void of proof from which an inference can be drawn that any of the individual physicians (admittedly not acting as agents of the Hospital, *see* Petition p. 9), who reportedly desired to cut the flow of patients to Nanavati, conspired with anyone in the ER. Those physicians were neither factually linked to Nanavati's named conspirators nor named as defendants themselves. Finally, in this regard, no evidence exists that the Executive Committee, acting as an entity, had any involvement in the ER "boycott" alleged by Nanavati. Nanavati's dilemma is best expressed in *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 949 (6th Cir. 1983).

> The appellant must provide some factual bases upon which to find that the ostensibly independent referral decisions of the emergency room physicians are part of some concerted design between the two defendants or one defendant and some other conspirator. They have not done so.

The ER nurses and physicians, individual agents who are employees of a corporate entity, the Hospital, operating without the motive of a "personal stake" separate and apart from their corporate employer (unlike the individuals/conspirators in *American Society*) are not deemed separate economic entities for purposes of the multiplicity requirement of a § 1 conspiracy. At all times they acted as agents of the Hospital.

Since a hospital cannot conspire with itself, there

> can be no conspiracy as a matter of law. In order for an illegal Sherman Act conspiracy to exist, there must be two independent economic entities.

Friedman v. Delaware County Memorial Hospital, et al., 672 F. Supp. 171, 181, *aff'd*, 849 F.2d 600 (3rd Cir. 1988); *Potters Medical Center et al. v. The City Hospital Association et al.*, 800 F.2d 568 (6th Cir. 1986); *Tose v. First Pennsylvania Bank*, 648 F.2d 879 (3rd Cir. 1981), *cert. denied*, 454 U.S. 893 (1981).[9] As to this rule, the Supreme Court has already and clearly spoken. *Copperweld Corp. v. Independent Tubing Corp.*, 467 U.S. 752 (1984).

In order for the potential of a conspiracy, such as that in *American Society* to exist, there must be some degree of "economic sense" motivating the involvement of the participants.

> [I]f petitioners had no rational *economic* motive to conspire, and if their conduct is consistent with other equally plausible explanations, the conduct does not give rise to an inference of conspiracy. (Emphasis supplied.)

Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 596-597 (1986); *Monsanto v. Spray-Right Service Corp.*, 465 U.S. 752 (1984); *Friedman v. Delaware County Memorial Hospital*, 672 F. Supp. at 190; *Pontius v. Childrens Hospital*, 552 F. Supp. 1352, 1376 (W.D. Pa. 1982).

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9. Clearly, the finding of requisite multiplicity in the form of the Executive Committee acting as an entity is of no moment where no factual link exists between the alleged injury and the conduct of the "combination." Therefore, the Hospital cannot be found liable for conduct of the Executive Committee as a matter of fact even if they could conspire as a matter of law, which they cannot. *See Weiss v. York Hospital*, 745 F.2d 786 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

While anti-competitive motive and/or effect may suffice for civil Sherman Act liability, a *conspiracy* itself, nonetheless, must still be shown. At a minimum, a § 1 plaintiff must still show that defendants combined or conspired with the intent to restrain trade. *E.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142 (1968); *Smith v. Northern Michigan Hospital,* 703 F.2d at 949. Simple refusal to deal cannot support anti-trust liability. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). The jury found that Nanavati was "boycotted" not as a result of the Hospital's and Executive Committee's alleged desire to eliminate a competitor, a necessary ingredient to a finding of a conspiracy, but rather due to his inability to get along and work harmoniously with others. Thus, the rule of *American Society* simply does not apply to the instant case, much less stand in conflict with the Third Circuit ruling below.[10]

III.

This Court's decision in *Continental Ore Company v. Union Carbide Corp.* fails to support Petitioner's unasserted claim for § 1 liability based upon the Komansky Contract.

Continental Ore may only be obliquely applied herein and solely for the universally acknowledged proposition that the evidence must be analyzed as a whole. Even a cursory review of the Third Circuit's opinion reveals that that is precisely what the court did. Indeed, both the trial court and the Third Circuit indulged Nanavati far beyond the pale of his asserted conspiracy among Dr. Sorensen, the Executive Committee and Hospital by

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10. Other substantive failings exist in Nanavati's ER "boycot" theory — *i.e.*, failure to prove product or geographic market, failure to name any of the shadow, non-defendant conspirators in the pleadings or pre-trial, even as amended. *Garshman v. Universal Resources Holding Inc.*, 641 F. Supp. 1359, 1367-1390 (D.N.J. 1986), *aff'd,* 824 F.2d 223 (3rd Cir. 1987).

examining the record for any previously unstated combination or permutation of conspirators.

Nanavati now contends that he set forth a claim at trial for a § 1 violation based upon the exclusive Komansky Contract to read echocardiograms and stress tests. However, a review of both the pre-trial and the charge to the jury reveals that the Komansky Contract was submitted to the jury solely to prove a violation of 42 U.S.C § 1981 based upon racial discrimination, a claim since abandoned by Nanavati (Trial Tr., 7/15/88, 45:18-47:11). The trial court and Third Circuit thus need not have reviewed the substance of the exclusive contract claim.[11] The Third Circuit accurately found that Nanavati had only submitted the issues of revocation of privileges and boycott to the jury for anti-trust consideration. The "exclusive" contract anti-trust claim was, therefore, waived. Fed. R. Civ. Proc. 51.

In any event, analysis of the substance of the Komansky Contract (assuming its characterization as a § 1 target) reveals multiple flaws. First, Nanavati sought either merely to supplant his exclusive services for those of Komansky or to add his name to the list of providers (3132a). "Merely changing exclusive contractors . . . cannot constitute a violation of the anti-trust law." *Drs. Steuer and Latham v. Nat. Med. Enterprises,* 672 F. Supp. 1489, 1502 (D.S.C. 1987). Second, no proof exists in the record that Nanavati could not and/or did not market his skills as an echocardiagram and stress test reader throughout the country.

In *Jefferson Parish Hospital District No. 2 v.*

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11. It would be irrational for Nanavati to now argue that the Hospital and Executive Committee somehow waived objection to his submission of the Komansky Contract as part of his anti-trust proofs by failing to make a directed verdict motion with respect to it where that Contract was never submitted to the jury as part of his anti-trust proofs and where the amendment making them Sherman Act defendants came after motions for directed verdict.

> *Hyde,* 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d (1984) the Supreme Court confirmed that adisappointed competitor who must practice elsewhere does not constitute "anti- trust" injury.

Id. at 1501; *Collins v. Associated Pathologists, Ltd.,* 676 F. Supp. 1388, 1396 (C. D. Ill. 1987), *aff'd,* 844 F. 2d 473 (7th Cir. 1988). The abiding state of competition, not individual competitors, are to be protected by the anti-trust laws. *Brown Shoe Company v. United States,* 370 U.S. 294 (1962). Third, the supposed price discrepancy between the Komansky group's and Nanavati's charges is of no anti-trust consequence. Even assuming the discrepancy claimed by Nanavati existed (which it, in fact, did not) it would not establish anti-trust liability,

> [B]ecause the relevant inquiry is not whether prices have increased, but whether they have increased over the competitive level. Plaintiff, however, failed to offer any evidence regarding competitive pricing levels.

Drs. Steuer and Latham, 672 F. Supp. at 1502. The only other proof of "competitive" pricing levels in the record was Nanavati's charge of $400 per test, fully $200 more than that charged by the Komansky group.

Assuming, *arguendo*, that the Contract is viewed as a tying arrangement (although never labeled as such by Nanavati), similar failings abound. No proof was introduced that consumers of echocardiagram and stress test services viewed such services as separate and distinct from other in-hospital services for which a separate economic market existed — the entry criteria of a tying case. *Jefferson Parish Hospital District No. II v. Hyde,* 466 U.S. 2, 21 (1984). The determination of the existence of two separate product markets is derived not from the functional relationship

between the products, but rather from the consumer's independent demand for each of the items, separately. *Collins v. Associated Pathologists, Inc.*, 844 F.2d 473, 477 (7th Cir. 1988). No such consumer-based proof necessary to separate, in the public's eye, the Hospital services (a tying product) from the echocardiogram and stress test (the tied product) exists in this case. Assuming there did exist such duality, Nanavati further failed to demonstrate the existence of "market power"— the economic force necessary to compel consumers to use the tying product thereby enabling the Hospital to foist the tied product upon them. *Jefferson Parish,* 466 U.S. at 13, 14. Further, such "market power" or dominance is not the by-product of mere patient convenience. *Seidenstein v. National Medical Enterprises, Inc.*, 769 F.2d 1100, 1106, n. 2 (5th Cir. 1985). No market *per se* for either the tying or tied product was ever demonstrated.

Moreover, no testimony exists from which to conclude that the Hospital exploited its control over medical or surgical services (even assuming requisite market power) by requiring patients to have echocardiagrams or stress tests once hospitalized. *See Jefferson Parish,* 466 U.S. at 12. Therefore, no tying existed.

Finally, the Hospital, having derived no income from the tied product-representing the professional service of reading the tests, was not a competitor in the market of the tied product.

> The Hospital is not a competitor in the market of the tied product. It receives no part of the fee for interpreting the scans. In this respect the case differs from *Jefferson Parish* where the Hospital

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12. The absence of expert testimony in this regard, "Augurs strongly in favor of granting summary judgment against an antitrust plaintiff". *Drs. Steuer and Latham,* 872 F. Supp. at 1512, n. 25; *see, e.g. Military Service Realty, Inc. v. Realty Consultants of Virginia,* 823 F.2d 829 (4th Cir. 1987).

> and the anestheologists shared the fees for anesthesiological services . . . The lack of the Hospital's economic interest in the tied product is sufficient to defeat Dr. White's tying claim under either theory that he presses.

White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104 (4th Cir. 1987).

Therefore, Nanavati's reliance upon *Continental Ore* is immaterial.

IV.

Nanavati's failure to prove an anti-trust claim forecloses any entitlement to nominal damages and counsel fees.

As can be seen by reference to Points II and III above, Nanavati simply failed to make out the full compliment of antitrust elements with respect to any type of claim he now asserts. The mere labeling of the Executive Committee as a "section one combination" with respect to the revocation of privileges decision does not, alone, entitle Nanavati to damages, even nominal damages. He must prove the entirety of an anti-trust claim, not just selected component parts thereof. Any "damages" claimed by Nanavati were not related to his five day revocation and (even if such causation exists), proven to be other than personal as to him. *See Brunswick Court v. Pueblo Bowl-0-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969). Moreover, Nanavati failed to request nominal damages in the charge to the jury and failed to complain on appeal below of his entitlement to them. *U.S. Football League v. National Football League*, 644 F. Supp. 1040, 1054, n. 11 (S.D.N.Y. 1986). *aff'd*, 842 F.2d 1335 (2d Cir. 1988); *Herman Schwabe, Inc. v. United Shoe Manufacturing, Inc.*, 297 F.2d 906

(2d Cir. 1962), *cert. denied,* 369 U.S. 865 (1972). *See Youakim v. Miller, Director Department of Children & Family Services,* 425 U.S. 231 (1976). Thus, Nanavati is not entitled to a "clear pronouncement" on a non-existent claim.

Finally, no dispute exists that nominal damages are available to an anti-trust plaintiff, when requested, if the fact of actual damages is proven. Therefore, Nanavati petitions for writ of certiorari to correct, at best, an error below entirely personal as to him, bereft of national import. *See* R.L. and E. Grossman, *Supreme Court Practice,* § 4.15, pp. 295-296 (5th Ed. 1978).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1988

SUKETU H. NANAVATI, M.D.,

Petitioner,

v.

BURDETTE TOMLIN MEMORIAL HOSPITAL and EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE BURDETTE TOMLIN MEMORIAL HOSPITAL,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

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ON WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION

In the opening sentence of their Brief in Opposition for Respondents ("Resp.Br."), Burdette Tomlin[1] and the Committee proclaim that "[t]he removal of Dr. Nanavati from the Medical Staff . . . came as the result of fifteen separate charges and specifications focused, principally, upon his disruptiveness." Resp.Br., pp. 1-2. This statement is utterly disin-

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1. The defined terms and citation forms in the Petition for Writ of Certiorari ("Petition") are used in the same fashion herein.

genuous in light of the final and conclusive findings of the state courts of New Jersey—to which Respondents stipulated at trial—that the decision "to terminate Dr. Nanavati's staff privileges was not the result of a deliberative process." 5000a. Indeed, the New Jersey Supreme Court affirmed the finding that "Dr. Nanavati has never had a fair hearing [at the Hospital] on the revocation of his privileges." *Nanavati v. Burdette Tomlin Memorial Hospital*, 107 N.J. 240, 526 A.2d 697, 700 (1987). That court pointed out that "a doctor should not be cut off from staff membership merely because he or she has criticized hospital practices and other doctors." *Id.*, 526 A.2d at 703-04. And the court below concluded that "Nanavati's interpretation of events contributes to a robust debate on matters of public importance, namely the competence of medical care at a hospital." *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 108 (3d Cir. 1988), A-19.

In late 1988, the Hospital and Committee finally abandoned all charges first lodged in 1982. The Hospital even stipulated to a permanent state court injunction barring it "[f]rom revoking, suspending or restraining the plaintiff, Suketu H. Nanavati, M.D., from full staff privileges . . . ." A-107.

The balance of the Brief in Opposition is no more faithful to the facts, the law, or the policies which inform, and in this case, militate strongly in favor of the granting of the writ. In this Reply Brief, Petitioner explains why Respondents' arguments against granting the writ are insubstantial.

1. The District Court's Exercise of Discretion in Permitting Nanavati's Antitrust Claims against Respondents is Not Encompassed within the Petition, was Not Decided by the Court below, and Should Not be Addressed by the Court.

Respondents attempt to raise a new issue not encompassed within the Petition as their first and, presumably, strongest argument in opposition to the Petition. They claim

the trial court abused its discretion in permitting amendment of the complaint and final pretrial order.[2]

The Third Circuit has expressly not decided this issue. 857 F.2d at 115 n. 19, A-33. Should the Court grant the Writ and ultimately reverse, it will be time enough for the Third Circuit then to address Respondents' abuse of discretion argument.

The essential fact, therefore, is that Respondents' argument is irrelevant to the Petition and the issues now before the Court. The Court has explained why this is so:

> We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed, and we think this would be a poor case in which to depart from that practice.

J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 568 (1981).

2. The Writ Should be Granted to Rectify the Decision below, which Conflicts with this Court's Decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.*

Respondents' arguments actually highlight why the Petition should be granted. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), the Court imposed civil antitrust liability upon a nonprofit corporation based upon the actions of its agents, while the court below failed to do so.[3]

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2. The trial court, intimately familiar with the entire course of the pretrial and trial litigation, expressly found that there was no substantial prejudice to Respondents by allowing the amendment. 251a. This is particularly so since they were expressly permitted, as a condition thereof, to recall any witnesses they chose, with costs thereof imposed upon Petitioner. *Id.* That finding is not clearly erroneous but in fact quite accurate in light of the proceedings known first-hand by the trial judge. Contrary to Respondents' contention, therefore, there was no "bad faith" (Resp.Br. 9) by Nanavati found either by the trial court or the court below.

3. Respondents seem to suggest this topic was not raised in the Third

Respondents argue that there is no proof that the Hospital had any "anticompetitive or economic based motivation to conspire with anyone." Resp.Br., p. 13. That is factually inaccurate in light of the many years the Hospital pursued a bad faith vendetta against Nanavati and in light of BTMH's unreasonable contract with Komansky. More important for present purposes, however, Respondents' argument conflicts with *Mechanical Engineers*. There was no suggestion by the Court in that case that the society had any anticompetitive motivation or that its economic intent was in any way germane. This is true because the issue was one of imputing to the corporation the conspiratorial acts of its agents. The opinion below thus conflicts with the rationale of this Court's decision and accords to our country's health care industry a precedent incompatible with our national commitment to free and open—but fair—competition. This is an appropriate circumstance for granting the Writ.

Respondents also seem to argue that the jury's finding of a conspiracy fails because there is no evidence of two or more economic entities. Resp.Br., p. 13-14. They argue further, relying upon a quotation from *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986), that "there must be some degree of 'economic sense' motivating the involvement of the participants." Resp.Br., p. 14. Yet, even the Third Circuit acknowledged that there was evidence of a "referrals boycott" by physicians on the staff. 857 F.2d at 119, A-41. The only issue, then, is whether either or both of the Respondents were linked to that conspiracy.[4]

Moreover, Respondents' quotation from *Matsushita* rein-

Circuit. Resp.Br., 12 n. 8. That is incorrect. For example, Nanavati's Brief below, after reviewing the evidence linking the Emergency Room personnel to the independent physicians' boycott, concluded (p. 17): "Since the ER was operated under contract for the Hospital, the boycott directly implicated BTMH as well as the individual physicians."

4. A careful reading of the Third Circuit opinion shows that it never directly addressed the linkage of the conspiracy to the Hospital, but only to the Committee. See 857 F.2d at 118-120, A-40—A-44 (Heading 2: "Boycott of Referrals by *the Executive Committee or Its Members*.")

forces the need for review here to reinstate the jury's verdict. The quoted passage (Resp.Br., p. 15) merely precludes an inference of conspiracy where there is "no rational economic motive to conspire" and where the defendant's conduct is also "consistent with other equally plausible explanations." 475 U.S. at 596. Yet, Respondents cannot and thus never have attempted to show that the failure of Hospital employees and agents to refer emergency cardiac patients from the ER to Dr. Nanavati—including his own patients—had *any* plausible explanation other than to join in the agreement by many physicians to limit, as Dr. Splitter testified, referrals by Indian doctors from the ER to the Hospital's intensive care unit. 4071a. (As the only Indian cardiologist, Nanavati was plainly the target of this boycott of the type of ER referrals to the ICU likely to occur in heart attack cases.) And as to a "rational economic motive to conspire," the ER physicians "and nurses . . . were in fear that if [they] suggested Dr. Nanavati to the patients, over other doctors, [they] would lose [their] job." A-115. Indeed, the Hospital administration "was terrorizing them" in its effort to enforce the boycott. A-114.

Respondents' various arguments are thus extraneous to whether certiorari should be granted. On examination of the merits, the arguments collapse.[5] But in any event, they are irrelevant to the question presented for review or the factors to be considered by the Court at this stage. The Petition should therefore be granted to correct the failure by the Third Circuit to impute to the Hospital the actions of BTMH's personnel in furtherance of the overall conspiracy. The Court can then "resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's hold-

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5. For example, Respondents inaccurately suggest that the boycott theory was also defective because of a "failure to prove product or geographic market." Resp.Br. 15 n.10. The trial court, however, had ample evidence on this issue and instructed the jury that the relevant market is the provision of cardiological care in Cape May County. 4400a. Respondents did not object to this instruction or otherwise assert this "market" issue in the trial court. They thus waived it, a conclusion reinforced by Fed.R.Civ.P. 49(a), 50(a) and (b), and 51.

ing in [*Mechanical Engineers*]." *United States v. Doe*, 465 U.S. 605, 610 (1984). *Mechanical Engineers* and the good "health" of our deregulated health care system require this result. See *Patrick v. Burget*, 486 U.S. —, 100 L.Ed.2d 83, 108 S.Ct. 1658 (1988).

3. The Fragmenting of an Antitrust Plaintiff's Proof, as Evidenced in the Opinion below, Conflicts with this Court's Decision in *Continental Ore Co. v. Union Carbide Corp.* and Threatens the Continued Viability of Congress's Intention to Foster Private Enforcement of the Sherman Act.

In resisting the Petition as to Question 2 therein, Respondents again misstate the record or otherwise resort to legally insignificant matter. First, Respondents argue that the Komansky contract was not submitted to the jury as a Section 1 violation, but only as a racial discrimination claim. Resp.Br. p. 16. This statement ignores the verdict questions and jury instructions, to which Respondents did not object, that allowed the jury to find a "*contract*, combination, *or* conspiracy in restraint of interstate commerce." 857 F.2d at 115, A-34 (Special Verdict question B1; emphasis supplied). The evidence disclosed only one contract—the Komansky contract—to which the jury charge and verdict question could relate. It is no wonder, then, that the district court understood that "Nanavati relies heavily" upon the Komansky contract for § 1 liability. *Nanavati v. Burdette Tomlin Memorial Hospital*, 645 F. Supp. at 1233; A-77; Petition, pp. 14-15. But, perhaps the clearest evidence that Respondents have again misstated the record[6] is the closing argument by Nanavati's counsel, which eliminates any question on this point:

So in February of '83 you got Sorensen saying ["]we're

6. Another outright misrepresentation to the Court is Respondents' statement that "the amendment making them Sherman Act defendants came after motions for directed verdict." Resp.Br. 16, n.11. The facts are that the amendment of the pleadings was allowed by order of June 24, 1986, 253a, while Respondents made motions for a directed verdict at the close of the evidence on July 11, 1986, nearly three weeks later. 272a.

> going to get an echo machine, Nanavati is going to suffer,["] you've got Komansky saying ["]that's when the guy from the hospital comes and says how about you and we get together and get an exclusive contract in echocardiograms.["] Is that evidence of combination, of agreement, of working together? Yes, I think so.

Tr. 7/14/86, p. 236.

Second, Respondents focus on the Komansky contract in isolation. Thus, while the Third Circuit did not analyze the contract under Section 1 at all, Respondents do not go much further. Specifically, they do not address the failure below to apply the doctrine of *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962), which requires consideration of the contract as evidence of the Hospital's participation in the boycott of Nanavati. In essence, the Hospital acted to deny him access to the opportunity of providing highly specialized cardiological interpretation to the Hospital's inpatients. See Petition, pp. 12-14. Instead, Respondents only address the contract standing alone.

Third, even Respondents' analysis of the evidence about the contract standing alone is misleadingly presented. For example, Respondents say "the trial record fails to support Nanavati's assertions" that the Hospital solicited Komansky to enter into an echocardiogram contract, rather than *vice versa.* Resp.Br., p. 4. Yet, Komansky's testimony belies their representation to this Court (4264a):

> Q And then you said somebody came back to you, the hospital approached you concerning setting up both the stress and the echo; is that correct?
>
> A Correct.

Nor is this a case where Nanavati claims that a change of exclusive contractors occurred which would constitute an antitrust violation. Cf. Resp.Br. p. 16.

Fourth, Respondents question whether there was injury to competition by a contract which required every echocardiogram performed in the Hospital to be professionally inter-

preted by a non-cardiologist. Since neither Nanavati nor anyone else was afforded an opportunity to bid on such a contract or to provide the service on a competitive, non-exclusive basis at the only hospital in the entire county, an injury to competition is clear. The $200 super-competitive price charged by Komansky is evidence of this in light of Nanavati's price of $100.[7]

Finally, Respondents raise a strawman argument, discussing why the Komansky contract was not an unlawful tying agreement. Resp.Br. p. 17-19. Since Petitioner did not proceed on this tying theory, that discussion is entirely beside the point.

When the inaccuracies and irrelevancies of the Respondents' arguments are swept aside as they ought to be, it is evident that the opinion below failed to give Petitioner the full benefit of the evidence which the jury heard. The Petition should accordingly be granted to uphold the doctrine of *Continental Ore* and consistent with it, reinstate the jury's verdict.

4. The Entitlement to Nominal Damages Should be Addressed by the Court.

Respondents assert that the error below is "entirely personal" to Nanavati and "bereft of national import." Resp.Br., p. 20. Without citation to any authority, they assert that "no dispute exists that nominal damages are available to an antitrust plaintiff . . . ." *Id.* If that is indeed so, it is appropriate for the Court to so rule for the benefit of the national antitrust jurisprudence.

But Respondents claim that Nanavati failed to claim nominal damages below. Resp.Br., p. 19. He in fact requested damages and was awarded $350,000 by the jury, and he argued for them in the Court of Appeals. The issue of nominal damages did not arise until the appellate court affirmed the

7. While it is true that Nanavati's complete charge in his office for an echocardiogram on his own equipment was $400, that included items for which BTMH billed the patient separately for echocardiograms performed in the Hospital. These additional items included the costs of the expensive equipment, space, operating personnel, and the like.

finding of a Sherman Act Section 1 combination. That court ignored the evidence of the combination's impact on Nanavati even for the five days during which he was suspended from the Hospital before he obtained a temporary restraining order in state court. Thus, this Petition is the first meaningful opportunity for Nanavati to raise this defect in the opinion below.

The United States District Court for the Southern District of New York recently emphasized the importance of enforcing the Clayton Act's award of attorneys' fees and expenses even where only nominal damages have been recovered. In *United States Football League v. National Football League*, 1989-1 Trade Cas. (CCH) ¶ 68,407 (S.D. N.Y. 1989), the court awarded over $5 million in attorneys' fees following a vindication of the antitrust laws by a jury verdict of only $1 in nominal damages.

In these circumstances, the Petition should be granted to permit the Court to announce the proper role of nominal damages and a concomitant award of attorneys' fees in private civil antitrust cases.

CONCLUSION

The Brief in Opposition for Respondents fails to proffer any substantial basis to deny the Petition. To the contrary, for all the foregoing reasons and those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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